

IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 123

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO, *Petitioner,*

—v.—

GEORGE W. HARDEMAN, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Plaintiff's Statement of Claim, Filed April 4, 1966	2
Defendant's Answer, Filed Jan. 29, 1968	8
Plaintiff's Amended Statement of Claim, Filed Jan. 17, 1969	10
Transcript of Proceedings of Jury Trial in U. S. District Court, Jan. 16 and 17, 1969:	11
Introductory Material	11
Excerpt from Opening Statement by Counsel for Plaintiff	12

	Page
Excerpt from Opening Statement by Counsel for Defendant	12
Excerpts from Testimony of Herman M. Wise, Witness on Behalf of Plaintiff, Direct Examination	14
Excerpts from Testimony of George W. Hardeman, Witness on Behalf of Plaintiff	
Direct Examination	16
Cross-Examination	20
Excerpts from Testimony of Herman M. Wise, Witness on Behalf of Defendant	
Direct Examination	21
Cross-Examination	32
Excerpts from Testimony of Richard N. Kittrell, Witness on Behalf of Plaintiff	35
Excerpt from District Court's Charge to Jury	36
Plaintiff's Exhibit No. 1—Transcript of Hearing Before Trial Committee of Local Lodge 112, Nov. 12, 1960	39
Introductory Material	39
Excerpts of Proceedings	40
Excerpt from Plaintiff's Exhibit No. 2—Local Lodge Minute Entry	56
Plaintiff's Exhibit No. 5—Letter to Hardeman from Int'l. President, Dec. 19, 1960	56
Plaintiff's Exhibit No. 16—Letter to Hardeman from Int'l. Secretary-Treasurer, April 19, 1961	59
Defendant's Exhibit No. 3—Unemployed Registration Card for George Hardeman	61
Excerpt from Defendant's Exhibit No. 4—Article XII(1) of Local Lodge Bylaws	62
Excerpt from Defendant's Exhibit No. 5—Article XIII, Sec. 1 of Subordinate Lodge Constitution	63
Judgment of District Court, Including Jury Verdict, Filed Jan. 17, 1969	64

	Page
Per Curiam Opinion of Court of Appeals, December 22, 1969, and Opinion of Court in <i>Braswell</i>	66, 68
Judgment of Court of Appeals, Filed December 22, 1969	83
Supreme Court Order Allowing Certiorari	85

**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

April 4, 1966	Plaintiff Hardeman's complaint filed in U. S. District Court for Southern District of Alabama, Southern Division.
July 25, 1966	Defendant's motion to dismiss filed.
December 29, 1966	Order entered denying Defendant's motion to dismiss.
January 29, 1968	Defendant's answer filed.
January 16, 1969	Jury trial of action commenced.
January 17, 1969	Plaintiff's amended complaint filed
January 17, 1969	Court's charge to the jury, and verdict of the jury in favor of Plaintiff and against Defendant in sum of \$152,150 and costs. Judgment entered.
January 27, 1969	Defendant's motion to set aside judgment and grant a new trial, or, in the alternative, for judgment notwithstanding verdict filed.
March 10, 1969	Order entered denying Defendant's motion to set aside judgment and grant a new trial.
March 19, 1969	Defendant's notice of appeal filed.
December 11, 1969	Appellant's motion to reinstate appeal to regular docket for full argument or, in the alternative, for leave to file reply brief filed.
December 22, 1969	Opinion and judgment of Court of Appeals.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

GEORGE W. HARDEMAN,

Plaintiff,

vs.

THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON
SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS,
an unincorporated association.

Defendant.

Civil Action No. 4038-66

Statement of Claim

(Filed April 4, 1966)

Count One

Plaintiff claims of Defendant, Three Hundred Thousand and No/100 (\$300,000.00) Dollars, as damages for that:

1. Defendant is an unincorporated association composed of boilermakers.

2. Plaintiff avers that he has exhausted all reasonable Internal Remedies offered by the Defendant as required by statute.

3. Prior to October 29, 1960, plaintiff was a boilermaker and was a member of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, heretofore referred to as the defendant.

4. On or about, to-wit, October 29, 1960, plaintiff was tried before a board selected by the defendant on charges of violating Article XIII, Section I, Subordinate Lodge Constitution of the Defendant and Article XII, Section I, of the Subordinate Lodge By-Laws of the Defendant. As a result of this hearing, plaintiff alleges that his membership in the defendant was revoked.

5. Plaintiff brings this suit under Title 29, U. S. C. A. Section 401 et seq, also known as the Labor Management Reporting and Disclosure Act (1959) and alleges that he did not receive a full and fair hearing by the aforementioned board for the following reasons:

6. The Findings of said board did not conform to the evidence considered by said board at said hearing.

7. The aforementioned board wrongfully found plaintiff guilty and did wrongfully revoke plaintiff's membership in the defendant, contrary to the provisions of Title 29, Section 401 et seq.

8. Wherefore: As a proximate result of the aforementioned wrongful action of defendant, plaintiff was damaged in the following: He has suffered loss of wages and income since he is unable to work now that he has lost his Union Card and membership in the Union. He has also suffered the loss of his person and retirement which was provided as an incident of Union Membership, he has also suffered the loss of insurance benefits which were his as a member of the aforementioned Union, and plaintiff has suffered embarrassment and injury to his reputation and plaintiff has suffered mental anguish all as a direct and proximate result of the aforementioned wrongful act of defendant.

9. Plaintiff also claims punitive damages for the aforementioned wrongful act of defendant.

Wherefore: Plaintiff brings this suit and asks judgment in the above amount.

Count Two

Plaintiff claims of defendant Three Hundred Thousand and No/100 (\$300,000.00) Dollars, as damages for that:

1. Defendant is an unincorporated association composed of boilermakers.

2. Plaintiff avers that he has exhausted all reasonable Internal Remedies offered by the defendant as required by statute.

3. Prior to October 29, 1960, plaintiff was a boilermaker and was a member of the International Brotherhood of

Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, heretofore referred to as the defendant.

4. On or about, to-wit, Octobr 29, 1960, plaintiff was tried before a board selected by the defendant on charges of violating Article XIII, Section I, of the Subordinate Lodge Constitution of the defendant, and Article XII, Section I, of the Subordinate Lodge By-Laws of the defendant. As a result of this hearing, plaintiff alleges that his membership in the defendant was revoked.

5. Plaintiff brings this suit under Title 29 U.S. C.A. Section 401 et seq, also known as the Labor Management Reporting and Disclosure Act (1959) and alleges that he did not receive a full and fair hearing by the aforementioned board for the following reasons:

6. The board was biased and improperly selected and the members of said board were then indebted and would continue to be indebted to the person who brought the charges before the board against your plaintiff.

7. The aforementioned board wrongfully found plaintiff guilty and did wrongfully revoke plaintiff's membership in the defendant, contrary to the provisions of Title 29, Sections 401 et seq.

8. Wherefore: As a proximate result of the aforementioned wrongful action of defendant, plaintiff was damaged in the following: He has suffered loss of wages and income since he is unable to work now that he has lost his Union Card and membership in the Union. He has also suffered the loss of his pension and retirement which was provided as an incident of Union Membership, he has also suffered the loss of insurance benefits which were his as a member of the aforementioned Union, and plaintiff has suffered embarrassment and injury to his reputation and plaintiff has suffered mental anguish all as a direct and proximate result of the aforementioned wrongful act of defendant.

9. Plaintiff also claims punitive damages for the aforementioned wrongful act of defendant.

Wherefore: Plaintiff brings this suit and asks judgment in the above amount.

Count Three

Plaintiff claims of defendant Three Hundred Thousand And No/100 (\$300,000.00) Dollars, as damages for that:

1. Defendant is an unincorporated association composed of boilermakers.

2. Plaintiff avers that he has exhausted all reasonable Internal Remedies offered by the defendant as required by statute.

3. Prior to October 29, 1960, plaintiff was a boilermaker and was a member of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, heretofore referred to as the defendant.

4. On or about, to-wit, October 29, 1960, plaintiff was tried before a board selected by the defendant on charges of violating Article XIII, Section I, Subordinate Lodge Constitution of the defendant and Article XII, Section I, of the Subordinate Lodge By-Laws of the defendant. As a result of this hearing, plaintiff alleges that his membership in the defendant was revoked.

5. Plaintiff brings this suit under Title 29, U.S. C.A. Section 401 et seq, also known as the Labor Management Reporting and Disclosure Act (1959) and alleges that he did not receive a full and fair hearing by the aforementioned board for the following reasons:

6. The evidence considered by said board did not conform to the charges presented.

7. The aforementioned board wrongfully found plaintiff guilty and did wrongfully revoke plaintiff's membership in the defendant, contrary to the provisions of Title 29, Sections 401 et seq.

8. Wherefore: As a proximate result of the aforementioned wrongful action of defendant, plaintiff was damaged in the following: He has suffered loss of wages and income since he is unable to work now that he has lost his Union Card and membership in the Union. He has also suffered the loss of his pension and retirement which was provided as an incident of Union Membership, he has also suffered the loss of insurance benefits which were his as a member of the aforementioned Union, and plaintiff has suffered embarrassment and injury to his reputation and

plaintiff has suffered mental anguish all as a direct and proximate result of the aforementioned wrongful act of defendant.

9. Plaintiff also claims punitive damages for the aforementioned wrongful act of defendant:

Wherefore: Plaintiff brings this suit and asks judgment in the above amount.

Count Four

Plaintiff claims of Defendant Three Hundred Thousand And No/100 (\$300,000.00) Dollars, as damages for that:

1. Defendant is an unincorporated association composed of boilermakers.

2. Plaintiff avers that he has exhausted all reasonable Internal Remedies offered by the defendant as required by statute.

3. Prior to October 29, 1960, plaintiff was a boilermaker and was a member of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, heretofore referred to as the defendant.

4. On or about, to-wit, October 29, 1960, plaintiff was tried before a board selected by the defendant on charges of violating Article XIII, Section I, Subordinate Lodge Constitution of the Defendant and Article XII, Section I, of the Subordinate Lodge By-Laws of the defendant. As a result of this hearing, plaintiff alleges that his membership in the defendant was revoked.

5. Plaintiff brings this suit under Title 29, U.S. C.A. Sections 401 et seq, also known as the Labor Management Reporting and Disclosure Act (1959) and alleges that he did not receive a full and fair hearing by the aforementioned board for the following reasons:

6. For that the sentence and punishment by said board was cruel and unusual punishment for the offense which your plaintiff was found guilty of.

7. The aforementioned board wrongfully found plaintiff guilty and did wrongfully revoke plaintiff's membership in the defendant, contrary to the provisions of Title 29, Sections 401 et seq.

8. Wherefore: As a proximate result of the aforementioned wrongful action of defendant, plaintiff was damaged in the following: He has suffered loss of wages and income since he is unable to work now that he has lost his Union Card and membership in the Union. He has also suffered the loss of pension and retirement which was provided as an incident of Union Membership, he has also suffered the loss of insurance benefits which were his as a member of the aforementioned Union, and plaintiff has suffered embarrassment and injury to his reputation and plaintiff has suffered mental anguish all as a direct and proximate result of the aforementioned wrongful act of defendant.

9. Plaintiff also claims punitive damages for the aforementioned wrongful act of defendant.

Wherefore, Plaintiff brings this suit and asks judgment in the above amount.

/s/ ROBERT E. McDONALD, JR.,
ROBERT E. McDONALD, JR.,

Attorney for Plaintiff

Plaintiff respectfully demands a trial by jury.

/s/ ROBERT E. McDONALD, JR.,
ROBERT E. McDONALD, JR.,

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

[Caption Omitted]

ANSWER

(Filed January 29, 1968)

Comes now the defendant in the above styled cause and for answer to the Statement of Claim, count by count, paragraph by paragraph, says as follows:

Count One

1. Defendant admits the allegations in paragraph one of count one.
2. Defendant denies the allegations in paragraph two of count one and demands strict proof.
3. Defendant admits the allegations in paragraph three of count one.
4. Defendant denies the allegations in paragraph four, five, six, seven, eight and nine of count one and joins issue with the Plaintiff on these said paragraphs.

Count Two

1. Defendant admits the allegations in paragraph one of count two.
2. Defendant denies the allegations in paragraph two of count two.
3. Defendant admits the allegations in paragraph three of count two.
4. Defendant denies the allegations in paragraph four, five, six, seven, eight and nine of count two and joins issue with the Plaintiff on these said paragraphs.

Count Three

1. Defendant admits the allegations of paragraph one of count three.
2. Defendant denies the allegations of paragraph two of count three.

3. Defendant admits the allegations of paragraph three of count three.

4. Defendant denies the allegations of paragraph four, five, six, seven, eight and nine of count three and joins issue with the Plaintiff on these said paragraphs.

Count Four

1. Defendant admits the allegations of paragraph one of count four.

2. Defendant denies the allegations of paragraph two of count four.

3. Defendant admits the allegations of paragraph three of count four.

4. Defendant denies the allegations of paragraph four, five, six, seven, eight and nine of count four and joins issue with the Plaintiff on these said paragraphs.

BRUTKIEWICZ & CRAIN

By /s/ DONALD E. BRUTKIEWICZ
DONALD E. BRUTKIEWICZ

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

[Caption Omitted]

Amended Statement of Claim

(Filed January 17, 1969)

Plaintiff with leave of Court had and obtained amends his bill of complaint and each count thereof by striking from paragraph four in each count the words "selected by the defendant" and adding to the said paragraph four in each count of the bill of complaint the averment that defendant finally refused plaintiffs appeal on to-wit April 19, 1961.

/s/ ROBERT E. McDONALD, JR.,
ROBERT E. McDONALD, JR.,
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

[Caption Omitted]

Transcript of Proceedings of Jury Trial

(Held January 16, 17, 1969)

* * *

[1] This cause coming on to be heard before the HONORABLE DANIEL H. THOMAS, United States District Judge, on the 16th and 17th days of January, 1969, the same being two of the trial days of the said Court, beginning at approximately 9:30 o'clock, a.m. each day, with a Jury, the following testimony was offered and proceedings had:

[2] APPEARANCES:

For the Plaintiff:

ROBERT E. McDONALD, JR., Esq.
Attorney-At-Law
First National Bank Building
Mobile, Alabama

For the Defendant:

MESSES. BRUTKIEWICZ & CRANE
Attorneys-At-Law
Van Antwerp Building
Mobile, Alabama

By: DONALD E. BRUTKIEWICZ, Esq.

JOHN J. BLAKE, Esq.
Attorney-At-Law
570 New Brotherhood Building
Kansas City, Kansas

CHARLES A. HOWARD,
Reporter.

* * *

OPENING STATEMENT

By Counsel for Plaintiff

* * *

[7] This case is a damage-type suit. It is a suit for money damages and it is occasioned by what we expect to prove was the wrongful expulsion of George Hardeman from the Defendant Union back in 1960.

* * *

OPENING STATEMENT

By Counsel for Defendant

* * *

[13] After this duly elected trial body met, they returned this finding according to the rules [14] and regulations set out in the constitution and they had to turn around and submit their findings of the trial body to the entire membership of the Local and the entire membership of the Local voted to have him expelled indefinitely from the Union. Now, what did that mean? That meant he was expelled from the Union for an indefinite period of time. It was not forever. He went out of the Union.

Mr. Bullock, who had been similarly situated and also engaged in the fistieuffs at the Union Hall, he waited around and came back and filed his petition for reinstatement and was duly reinstated.

MR. McDONALD:

I object to that. What Mr. Bullock did in this case is irrelevant to this case and is prejudicial remarks.

THE COURT:

Let me see you all in my office.

(Whereupon, the following occurred in Chambers:)

THE COURT:

[15] I don't remember this phase of it and I don't know whether it is admissible or not. What is it?

MR. BRUTKIEWICZ:

Bullock was the third person involved, Judge, and I intended to show that he could have minimized his damages, if he actually were damaged, and that he could have applied for reinstatement as Bullock did. He was reinstated back in the Union, a card-carrying member, and has worked as a foreman on several jobs since.

MR. McDONALD:

Judge, that would be purely speculative as to whether or not Mr. Hardeman would be reinstated.

MR. BLAKE:

Mr. Hardeman made no effort to be reinstated.

MR. McDONALD:

I would like to point out to the Court that the Braswell case was on file at the time they took Mr. Bullock back in.

THE COURT:

I think the fact that he did not apply for reinstatement is admissible. I think the fact that Bullock did apply and was reinstated is [16] inadmissible. I think it is speculative as to whether Hardeman would have been reinstated or not. Whether Bullock was or was not, I don't think it is material. I am going to sustain the objection to that, but I think the fact that Hardeman could have applied and didn't is admissible.

MR. BLAKE:

We will take exception to that, Your Honor.

MR. BRUTKIEWICZ:

I would like to point out, Judge, that there are a whole line of decisions, not particularly on this point, but the other way, if two or three people are disciplined by the Union and one of the two takes an appellate relief and is denied, then it is naturally assumed that those three that didn't even apply would have been turned down the same as the person who did apply.

MR. McDONALD:

What has that got to do with the application for reinstatement?

THE COURT:

[17] Well, I may be right or I may be wrong, but that is the way I am going to rule on it. The fact that one man was reinstated, I don't think is admissible. I think the fact that he did not apply for reinstatement is admissible and I hope I am right.

Let's go back to the Courtroom.

(Back in open Court.)

THE COURT:

Proceed, Mr. Brutkiewicz.

MR. BRUTKIEWICZ:

If it please the Court, if I recollect, I was talking about Mr. Hardeman not making any effort to minimize his damages and not making any effort to reinstate himself in this local. He could have made the application and the probabilities are good that he would have been reinstated.

MR. McDONALD:

Judge, I am going to object to his arguments on probability.

THE COURT:

Sustained.

* * *

TESTIMONY OF HERMAN H. WISE, WITNESS ON BEHALF OF PLAINTIFF

Direct Examination

* * *

[26] MR. McDONALD:

All right, sir. Now, on the basis of this, a vote was taken in the local lodge after this as to whether or not to affirm this. Do you have the minutes of that meeting?

A I do, sir.

Q All right. I notice they are in the minute book.

A Here it is.

MR. McDONALD:

Your Honor, I am going to offer these. These are the minutes of that particular meeting.

A That is correct.

Q Which voted on the expulsion?

A That is correct.

* * *

[27] Judge, we particularly are interested only in the minutes which pertain to the expulsion vote. The rest of the minutes we are not interested in. We could limit our introduction as to that portion only, that page only.

THE COURT:

All right. Mr. Wise, point out the page which has only to do with the expulsion.

THE WITNESS:

Yes, sir.

THE COURT:

All right. Mr. O'Connor, have someone to get a [28] photostat of that and then return the minute book.

(Whereupon, said minute entry with regard to the expulsion of Mr. Hardeman was received and marked in evidence, Plaintiff's Exhibit No. 2.)

* * *

[30] Q Now, subsequent to this, the Executive Council did try the appeal, didn't it?

A They heard the appeal.

Q This was the Executive Council of the International Brotherhood, the parent organization, the Defendant, and not the local lodge, is that correct?

A It was a panel of the Executive Council that heard the appeal, correct.

Q And it was a part of the Defendant, the International body?

A It was the panel from the Executive Council of the International.

Q Of the International and not Lodge 112?

A That is correct.

* * *

TESTIMONY OF GEORGE W. HARDEMAN,
WITNESS ON BEHALF OF PLAINTIFF

Direct Examination

* * *

[75] Q All right, sir. Tell this Jury exactly what a business agent does in a union.

* * *

[75] A He sends the men out on jobs, gives you a referral card to go to work.

* * *

[77] Q All right. Now, you have told us the business agent is the man who refers people out to work from the hall?

A Yes.

Q Is he an elected official?

A Yes, sir.

Q And he serves in each local, is that correct?

A Yes.

Q Now, who does he select—which man will go out to work?

A Well, when I was in the local—I don't know how it is run now. We had an out-of-work book. When we come in off of a job, we put our name down, each man. You come down the list, you take the men as they come and go down the list.

Q In other words, in the order they are on the list?

A Yes, sir.

[78] Q And that is provided for by law, isn't it?

A Yes, sir.

Q And those are the ways he selects the men to go out on a job?

A Yes, sir.

Q Isn't it also a fact when a local contractor needs boilermakers, does he call the business agent to send them to him or does he go out and hire them?

A Well, he is not supposed to do it. He is not supposed to go out and hire them. He is supposed to call the business agent and the business agent is supposed to give him a referral and they take the referral on the job.

* * *

[80] Q How does a contractor hire the boilermakers?

A Well, the way it is supposed to be did, he will call the business agent and he will tell him how many men he wants and what he wants, whether he wants welders, riggers, tube rollers, whatever he wants. Well, the men go down this list, this book, from the top. He starts at the top and comes down.

Q At the top of what?

A The list.

Q Which list?

A The out-of-work book.

Q The out-of-work list?

[81] A Yes, sir. He sends these men out there.

Q That is the business agent?

A Yes, sir.

Q Now, is this according to the agreement between the Union and the contractors that they will hire men in this manner?

A Yes, sir, or by letter or by telegram.

Q A letter or telegram to who?

A From the contractor requesting such and such a man.

Q Okay. From the contractor to whom?

A Business agent.

Q The business agent?

A That's right.

* * *

[115] Q Did you, at any time, attempt to go on the out-of-work list in the Lodge under the right-to-work law in Alabama?

A Yes, sir.

Q This was after your expulsion from the Union?

A Yes, sir.

Q Did the business agent send you out on any jobs?

A Sent me out on one.

Q Where was that job?

A Pensacola.

Q How long did it last?

A I don't know how long the job last, but I couldn't stay [116] but five days.

. . .

[116] Q Why did you leave?

A They run me off; work dissatisfactory.

Q Were you doing satisfactory work, at that time?

A I think I was.

MR. BLAKE:

I object to that.

THE COURT:

Sustain the objection.

BY MR. McDONALD:

Q All right. Who run you off, the boss or one of the boilermakers?

MR. BLAKE:

I will object to Counsel's colloquialism, "Running off".

THE COURT:

[117] Overruled.

THE WITNESS:

The foreman.

BY MR. McDONALD:

Q Was he a boilermaker?

A Yes, sir.

Q Who gave him his job?

A Mr. Wise.

MR. BLAKE:

Your Honor, I move . . .

THE COURT:

Sustain the objection and exclude the answer.

MR. McDONALD:

Q Well, who decided he would be foreman of the group that went out to work?

MR. BLAKE:

I will object again.

THE COURT:

Sustain the objection.

BY MR. McDONALD:

Q After that, did your name continue on the out-of-work list in the Local Lodge?

A Yes, sir.

[118] Q Were you ever called for any more work, since that time?

A No, sir.

Q So, even though you were registered on the out-of-work list since 1960, you were only called for one job and that was for five days?

A Yes, sir.

Q All right, sir. Could you go on the out-of-work list without a card in lodges that are outside of the State of Alabama that don't have the right-to-work law?

A No, sir.

MR. BLAKE:

Your Honor, I object to that.

THE COURT:

Sustain the objection.

MR. BLAKE:

He has not laid any foundation that this witness could answer any such questions.

THE COURT:

Sustain the objection.

BY MR. McDONALD:

Q Well, you went on the out-of-work list and tried to get work as a boilermaker, you told us, and you [119] also told us you had been to some shops.

What other efforts did you make to get work as a boilermaker?

A Went to the Alabama Shipyard.

Q Did you get a job over there as a boilermaker?

A No, sir.

Q Anything else?

A I don't know of anything else that the boilermaker covers.

. . .

Cross Examination

. . .

[149] Q All right. You understand that you do not have to be a member of any union in order to be put on the list, have your name on this in and out list?

A My name has been on that out-of-work list ever since the day they run me off in Pensacola.

Q Well, did you go by the Union Hall to see if they had any work for you?

A Yes, sir. I made several trips by there.

Q You went out on one job, didn't you?

A That is the one they run me off of....

. . .

[152] Q You know, as a matter of fact, the law is such and you know from being around the Union Hall that if you have your name on that list, whether you are a member or non-member, you are to be sent out?

A Yes, sir. If they had sent you out, they send out who they want to send out. That is what the fight started about, because I didn't get no work. Mr. Wise didn't like me. If I am not his friend, I don't get no work.

Q You had the same trouble with Mr. Otto Davis, didn't you?

A I turned the Labor Relations Board loose on him; yes, sir, for skipping everybody on the work list. That is the reason I didn't get no more work.

. . .

TESTIMONY OF HERMAN H. WISE, WITNESS
ON BEHALF OF DEFENDANT

[291] Direct Examination

BY MR. BLAKE:

Q Mr. Wise, would you state your name and address, please?

A My name is Herman H. Wise. I live at 3827 Waco Street in Whistler, in the Whistler community, Eight Mile area.

Q Mr. Wise, are you a member of the Boilermakers Union?

A Yes, I am.

Q And to what Local do you belong?

A I belong to Local 112.

[292] Q Is that here in Mobile?

A Right.

Q How long have you been a member of this Union?

A I have been a member since 1942, February, and continuously a member since September of 1946.

Q Do you hold an elected office in that Local Union?

A Yes, I do.

Q What is that elected office?

A Business Manager, Secretary and Treasurer.

Q When were you last elected to that office?

A I was elected in June of 1966 to my last term.

Q Did you hold the office prior to that time?

A I did.

Q Were you elected on other occasions?

A I was elected in 1963, in June, and in 1960 in June.

Q So, then, you have been Business Manager of the Local continuously since 1960?

A Correct.

Q Now, I want to call your attention back to the year

of 1960 and the two or three years preceding that.

Were you working at the trade during those years?

A I was working at the trade, seeking and working at the [293] trade prior to being elected to office.

Q Let's go back to the year 1959. What was the condition of available work, at that time, Mr. Wise?

MR. McDONALD:

Your Honor, I am going to object—Never mind, I withdraw the objection.

THE COURT:

All right.

BY MR. BLAKE:

Q Go ahead.

A The year of 1959 was the last year that I was seeking work in the field. The construction work was low that year.

Q How much did you work yourself that year?

A I worked very little that year.

Q How about 1958, how much did you work that year?

A I worked very little in 1958. There wasn't too much or the work was low also. It was tapering off in 1958.

Q How about the early part of 1960 until you were elected business agent?

A The early part of 1960, I did not work any.

Q All right. Were you a fully qualified mechanic, at [294] that time?

A I was. I had most all of the qualifications that were registered for boilermakers.

Q Were many other mechanics working, at this time?

A No, sir. At this particular time, as I stated, the work was low, slow, and there was a very few men working, at this time.

Q Now, you took office in what month of 1960?

A I was elected in June of 1960 and I was seated into office the first Saturday in July of 1960.

Q How many men were working out of the Local, at that time?

A When I taken office in 1960, to the best of my recollection, there was seventeen men out of the Local employed on construction.

Q How many men in the Local?

A The total membership was around 483 and 200 and approximately 60 were construction members.

Q Of those 260, seventeen were working?

A That's right, when I took office.

Q Did things improve in 1960?

A They improved very slowly, hardly any in 1960.

Q How about 1961?

[295] A They did not improve very much in 1961.

Q Do you recall approximately how many men were working in 1961?

A I had one job—we had one job that was in progress in 1961. It was at Scott Paper Company and about thirty-five to forty men or approximately that was what was employed, at that time.

Q So, in other words, there were a lot of boilermakers out of work, at this time, is that right?

A Correct.

Q A lot of them seeking work, is that correct?

A Correct.

Q. Now, at the time you became business agent, how many jobs did you actually have going?

MR. McDONALD:

I object, repetition. He stated seventeen.

THE COURT:

Overruled.

BY MR. BLAKE:

Q Go ahead.

A There was only one job going and one short job in the making shortly after I was seated into office.

Q All right. Now, again, at the time that you took office [296] in 1960, what type of referral procedure was in existence, at that time? Would you explain that in detail?

A At this time, there was what was known as the non-

exclusive referral system. This was whereby that—not members, but anybody that was qualified as a boilermaker could come by and register with my office for work.

However, you did not have to come by and register. He could pursue his job at the plants themselves. This was under the non-exclusive. This is whereby he came to the office and as he registered, his name was put on a sheet and it was from the top to the bottom. He was registered one under the other one as he came into the office and applied for a job and put his name on the list.

Q Did he have to come through the Union Hall in order to obtain work?

A No, sir. He did not have to come through the Union Hall to obtain work.

Q What other method could he have used?

A He could have went to the job. He could have secured his employment in any other method he so seeks [297] besides coming to the office.

Q There was nothing you could do about this?

A Not a thing in the world that the Local, myself or anybody could do about the situation.

Q So, any man that was qualified could go right to the job, obtain employment and go to work?

A Correct, he could have.

Q Now, was that changed?

A Yes, sir.

Q Was that system changed?

A Yes sir. It was changed.

Q When was it changed?

A This was changed in February of 1961.

Q All right. At that point what type of referral system did you put in or was put in?

A I did not. . . .

Q Strike that and let me go back.

How did the change come about, Mr. Wise?

A Let me state first the type that was put into effect.

Q All right.

A There was a non-exclusive. There was an exclusive put into effect later.

Q Would you explain that to us?

[298] A This exclusive type of referral system was put into effect by a committee under instructions from the national contractors, the International, with equal number of committeemen. In this case, there was two committeemen from the contractors and two from the Union.

Taking this agreement, which was negotiated into the national agreement, the Southeastern states agreement, which we operate under both. Taken that from this and this was the only way under the law we could operate a hiring hall and this was to be under a non-discriminatory basis.

Q This was according to the law?

A It was according to the law.

Q Would you explain to the Court and the Jury what you mean by a non-discriminatory basis?

A A non-discriminatory basis means that any applicant, regardless of his status in the Union and regardless of his status with regard to religion, race, creed, color or nationality or national origin, whereby he could come and establish his qualifications and could enter upon this non-discriminatory referral system and would be sent out according [299] to his qualifications and registration.

Q So, in other words, you couldn't deny a non-Union man the right to sign his name on that list?

A I could not and cannot now.

MR. McDONALD:

I object. He is leading the witness.

THE COURT:

Don't lead the witness.

BY MR. BLAKE:

Q All right. Let me ask you this, could you deny a qualified mechanic, who was not a member of the Union, the right to sign that list?

A I could not deny anybody the right to sign this list who has the qualifications.

Q All right. Now, let me ask you, your local union also represents or has the bargaining rights in some shops in this area, isn't that correct?

A Correct.

Q Are you familiar with these shops also?

A I am.

Q Now, are you also familiar with the Alabama Right-to-Work law?

A I am.

[300] Q Would you explain that please?

A The Alabama Right-To-Work law states that no man will be deprived the privilege of making a living in the State of Alabama whereby if he be a Union member or non-Union member he can go to this place of employment and seek his own employment.

Q Does he have to belong to the Union?

A He does not.

Q All right.

Q In fact, I have three—four shops in the Mobile area and shipyards that has equal number, if not more non-Union members working there today than have for years, and I have Union members working there and these members do not come to my Hall to be referred to these shops. They go to the shop themselves and secure their employment.

Q Can you affect their right to work in any way because they are not a member of the Union?

A I cannot . . . [301] I believe you said could I affect it. I could not affect this man's employment legally or illegally in any way. This is strictly the contractor's business and he operates it.

The Union contractors, the collective bargaining agreement whereby it is recognized and has been established by the Labor Relations Board—these people have the right to join a union or to not join a union. Therefore, we have some of them that are non-union members and some that are. They are mixed.

* * *

[317] Q Now, did Mr. Hardeman, after his indefinite expulsion, did he come back and sign the out-of-work list?

A He came back twice, to my knowledge, after the expulsion.

Q What happened on the first occasion?

A On the first occasion . . .

MR. McDONALD:

Excuse me just a minute.

THE COURT:

Did he get on the books?

THE WITNESS:

Yes, sir.

THE COURT:

All right. I think the question is too general.

BY MR. BLAKE:

Q Well, you have answered now that he did get on the books?

A You asked me . . .

[318] Q We are talking about the first time.

A The first time, right.

Q All right. Was he sent to a job as a result of that?

A Yes, sir. He was.

Q To what job was he sent?

A He was sent to the next job that was available, according to his name on the work list, and that was at St. Regis Paper Company, better known as Cantonement.

* * *

[318] Q Let me ask you this, Mr. Wise, do you know what happened to him on that job?

A Yes, sir. He was discharged for unsatisfactory work.

* * *

[325] Thank you. Now, you stated, I think, that—getting back to the case here, that Mr. Hardeman then signed the out-of-work list a second time, is that correct?

A Correct.

Q That was after he was indefinitely expelled?

A Correct.

Q Now, I hand you what has been marked as Defend-

ant's Exhibit No. 3, and I would like to have you identify this exhibit?

A This is an availability card, which, at that time, they were the same type of card, a duplicate issued to the member or person whose name was on the work list, and one kept in the office. This shows the date. . . .

MR. McDONALD:

Your Honor, I want to interrupt here. I think he has identified it and going further to [326] testify about it—if the document is in evidence, the document would speak for itself.

THE COURT:

Do you intend to offer it?

MR. BLAKE:

Yes, sir.

THE COURT:

All right.

MR. McDONALD:

May I take the witness on Voir Dire, Your Honor?

THE COURT:

Surely.

VOIR DIRE EXAMINATION

BY MR. McDONALD:

Q Mr. Hardeman. . . .

A I beg your pardon.

Q Mr. Wise, who makes up this document?

A You mean who presents them?

Q No sir. Who fills it in?

A The secretary in the office fills in those documents.

Q The individual himself that this document is about doesn't fill them in?

A He is standing there or mails them in. There is a [327] duplicate just alike signed, with a date, with a

little punch card there signifying the date that card is received and brought up to date and returned back to him.

MR. McDONALD:

I am going to withdraw any objection to this, Your Honor.

THE COURT:

All right.

BY MR. BLAKE:

Q Let me ask you one more question. Are these cards kept in your office, Mr. Wise?

A One kept in the office and one issued to the person on the work list.

Q Did you take this from your files in the office?

A Correct.

MR. BLAKE:

I offer Defendant's Exhibit No. 3.

THE COURT:

Mark it in.

(Whereupon, said file card was received and marked in evidence, Defendant's Exhibit No. 3.)

BY MR. BLAKE:

[328] Q Now, after the Plaintiff, Mr. Hardeman, signed the out-of-work list for the second time, was he sent out to work after that?

A No, sir.

THE COURT:

Let me interrupt just a minute. What do you call this?

THE WITNESS:

We call it an availability card. That is what is in the contract.

THE COURT:

All right. Go ahead.

BY MR. BLAKE:

Q Now, in order to keep on the out-of-work list, were there any requirements that an applicant had to meet?

A That is correct.

* * *

[329] THE WITNESS:

That is correct. Those requirements were that he was to be available for call at all times, and this referral standard, it was so stated that each applicant . . .

MR. McDONALD:

[330] Judge, I am going to object.

THE COURT:

Mr. Wise, are these qualifications in the by-laws?

THE WITNESS:

Not in the by-laws, but in the referral standards.

THE COURT:

Do you have those here?

THE WITNESS:

I don't know if I have the referral standards or not. I can get them pretty quick. This is a different thing from the by-laws.

BY MR. BLAKE:

Q Let me ask you this, Mr. Wise, and maybe this will clear it up. Are these referral standards outlined in brief form on Defendant's Exhibit No. 3?

* * *

[331] THE COURT:

Let me see it, please.

MR. BLAKE:

The rules for keeping your name on the list are on the back of that Defendant's Exhibit No. 3, is that correct?

A Well, Mr. Blake, until I read that over, I wouldn't know. There is some rules, but it may not cover all the rules of his availability.

THE COURT:

This says or is entitled, "Rules Regarding Job Referrals For Employment On A Non-discriminatory Basis," and I do think the document speaks for itself.

THE WITNESS:

Well, I will have to read it before I can say.

THE COURT:

Mr. Blake, I think he would be limited to what is on there.

MR. BLAKE:

All right.

THE WITNESS:

They are on there.

[332] BY MR. BLAKE:

Q They are on there?

A Yes.

Q Now, did, as a matter of fact, Mr. Hardeman come in and sign the out-of-work list at any time after these two you have already indicated?

A No, sir.

Q All right. Now, as a matter of fact, Mr. Wise, has Mr. Hardeman ever attempted to reinstate at the Union?

A No, sir.

MR. McDONALD:

Judge, I object to that as to whether he attempted to reinstate himself. It is completely irrelevant.

THE COURT:

Overruled.

BY MR. BLAKE:

Q You can answer the question.

A He has not ever attempted to reinstate.

MR. McDONALD:

I want to further object and move to exclude. The witness can only testify to whether he [333] has attempted through himself. He doesn't know what he might have attempted at any other lodge or International level and cannot testify to that.

THE COURT:

Mr. Wise, as business agent of Local 112, has he attempted to reinstate through Local Lodge 112?

THE WITNESS:

No sir.

* * *

CROSS EXAMINATION

* * *

[358] Q After telling us about the right-to-work law in Alabama and how people could work and you have pointed out here that George Hardeman was dispatched to Pensacola on March 8, 1961, isn't that what the figures say?

A Right.

Q And he told us about that one job he was sent on. You [359] were in the Courtroom when he testified. Do you recall when he testified about that?

A Right.

Q And I notice here that he reported here on April 3, 1961?

A No, sir. Mr. McDonald, you are reading that wrong.

Q What is the date reported?

A He reported back in the office and signed the work list and that was the date to put himself available on the work list.

Q All right. So 4/3/61 you testified he came back and put his name on the work list?

A Right.

Q I noticed he was never dispatched again?

A He never kept himself available when that thirty

days run out. He had seven days variation between the period he was to report back. He had seven days before that period or seven days after it.

Q Did you have George Hardeman's address?

A We had the address he left in the office.

Q Did you have his phone number?

A We had a phone number he left on some neighbor of his which is on his record.

[360] Q So, he was available at that address there as far as you knew?

A He did not keep himself available on that work list according to everybody else on his availability card.

Q What do you mean by available?

A It means he was to contact the office as everyone did by punching this card. He was going to keep himself available until we had work where we could call him. If he did not send his card in or bring it in, he would be removed from that work list at the end of that period, seven days beyond the limitation.

Q Isn't it also true that it is a practice in your union that you don't report to go back on the out-of-work list until you have been out on a job and the job is concluded or you are terminated?

A I don't believe I quite understand you on that one, Mr. McDonald.

Q You don't go on the out-of-work list until you are out-of-work, is that right?

A Well, if what you are saying is you don't go on a job and come back the next day and continue to work [361] on that job, no.

Q Right. George Hardeman reported he was out of work and was never sent out again?

A He never came back seeking any work. He never came back.

Q But yet you do admit that he had gone on the out-of-work list on April 3, 1961?

A That records shows that he come back and signed it then.

Q All right, sir. You were in the Courtroom and you heard George Hardeman testify that he went to several

shops and places in the Mobile area that employed boiler-makers and sought employment, didn't you?

A Mr. McDonald, I heard this, but that doesn't make it so, because he said he did.

Q Is it your testimony that Mr. Hardeman was lying?

A I am saying there has been work available in the shops, shipyards and on construction and he did not seek it.

Q As a matter of fact, wasn't it his testimony that he could not get work because of not being a union member?

A I am saying it is false, because he does not have to [362] belong to a union to seek work in these shops?

Q So, it doesn't make any difference in Alabama whether you are a member of a union or not?

A That is correct.

* * *

[368] Q Now, this job that George was sent out on in Cantonement after he was expelled, how long did he stay over there?

A The amount of days—I would have to get the records and see.

Q It was just a few days?

A It wasn't too long.

Q Now, isn't it true that you instructed the foremen and stewards over there to write him off?

A No, sir. That is incorrect.

Q He had to drag up and leave, though, because the conditions got pretty intolerable?

A I don't know about that. He was sent over there to do a job and he didn't do it and got run off for it just like he did on some other jobs.

* * *

[386] Q I mean in 1958, '59 or '60?

A I did not leave the territory.

Q You don't know what the construction was like in the rest of the country?

A We have a way of knowing by calling other business managers.

Q You weren't business manager then?

A But we, as members, know. There are people calling me from all over the United States. In the last three years, I had over a hundred non-union workers. I was taking every man in the country that called me and wanted to go to work in my area. It happened that the other areas had plenty of work, at that time, and nobody hunting work, but the non-union workers, I had over a hundred employed out of my Lodge.

* * *

TESTIMONY OF RICHARD N. KITTRELL,
WITNESS ON BEHALF OF PLAINTIFF

DIRECT EXAMINATION

* * *

[407] Q The question is, do you know whether or not a man could work in the trade of a boilermaker without a union card?

A In some places, they do, but in some places, they don't, without a referral. Locally, you can work without a boilermaker card.

Q But without a referral from the office?

A Well, I have never seen one go on the job without a referral, work order, but they didn't belong to the union. Union members were starving, I have seen that.

Q Can a man work regularly out of this Lodge without a union card?

A Some do; yes, sir.

MR. McDONALD:

That's all.

CROSS EXAMINATION

BY MR. BRUTKIEWICZ:

Q You said some do work out there without a union card?

A Yes, sir.

Q And you have also seen a lot of union men loaf and watched non-union men go to work?

A Yes. They call them permit men.

* * *

DISTRICT COURT'S CHARGE TO JURY

* * *

[440] . . . Mr. Hardeman, in his complaint, essentially says this, I was wrongfully expelled from the Union and I want damages because of it. I want to be paid, because they wrongfully expelled me and, in short, that [441] is what he says.

The burden of proof is on him to reasonably satisfy you that that is true. If he has done it, he is entitled to a verdict. If he hasn't done it, he isn't entitled to a verdict.

Now, you have to decide the facts. I have to decide the law. This is rather an unusual case to this extent; whether or not he was rightfully or wrongfully discharged or expelled is a pure question of law for me to determine. If I determine that he was wrongfully expelled, then it is up to you Ladies and Gentlemen to determine whether or not he is entitled to anything and, if so, how much. These two volumes here and that is not the one that doesn't have page 4 in it, but these two volumes here contain the entire testimony which was given before the first hearing. That is the three people who were appointed to try this matter for the Union. This is the entire transcript, which was taken by a Reporter just the same as Mr. Howard is taking this case here. I have read that transcript. I have read it in its entirety.

[442] The notice which was sent to Mr. Hardeman by the President of the Local Union, in effect says, we are going to have a hearing and you are charged with violations of Article 13, Section 1 of the Subordinate Lodge Constitution. Now, that is what they said he was going to be tried under, Article 13, Section 1.

I will paraphrase it, but it says this: "Any member who endeavors to create dissension among the members; or who works against the interests and harmony of the International Brotherhood or of any district or subordinate lodge; who advocates or encourages a division of the funds, or the dissolution of any district or subordinate lodge, or the separation of any district or subordinate

lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its subordinate lodges, or which is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International [443] Brotherhood."

As I have said, I have read the entire transcript and I have read nothing which would support a finding of guilty under that particular section.

Now, he was also notified that he was accused of violating Section 1 of Article 12 of the Subordinate Lodge By-Laws. Article 12 of Section 1 says, "It shall be a violation of these by-laws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office."

Now, those were the two charges that Mr. Hardeman was advised that he would be tried on. There is no evidence in this transcript which would justify him being convicted or found guilty in Section 1 of Article 13 of the Subordinate Lodge Constitution. All that is in this transcript is about the fight. That is the whole thing that is in that transcript.

Now, there may be, and I am not ruling on it one way [444] or the other, but I will say this that there is evidence in here which might support a finding of guilty under Section 1 of Article 12 of the Subordinate Lodge By-Laws, but the trial body said we find him guilty and we recommend that he be expelled. They didn't say we find him guilty under either one section or the other. They said they found him guilty. Inasmuch as there is nothing here which would support a conviction under this section, then I think the verdict cannot stand and his being convicted, the penalty for which was expelling him, and I think, inasmuch as there is no evidence which would support a

finding of guilty under this, that the finding of the board was erroneous and cannot stand in that respect.

Now, that is all they charged him with were those two sections and there is nothing in this record that would justify a finding of guilty under those sections. All of it is about the fight.

I am telling you, as a matter of law, that under the proof, the finding which resulted in his being expelled, cannot legally stand and therefore he was wrongfully expelled.

[445] Now, what you Ladies and Gentlemen have to decide is this; was he thereby damaged, and, if so, how much. If his wrongful expulsion damaged him, he is entitled to damages. You have first got to decide, did this wrongful expulsion damage him? If it did, then you have to go further and say, how much did it damage him? If his wrongful expulsion didn't damage him, then he is not entitled to anything.

Well, you would consider this, if you thought it damaged him, if it damaged him, he would be entitled to what is known as compensatory damages. That means in such an amount as would reasonably compensate him for being wrongfully expelled. If it caused him to lose valuable rights, what are they worth? If it caused him to lose wages, how much did it cause him to lose? If it caused him to lose wages in the past, then how much was it? Is it going to cause him to lose wages in the future, and, if so, how much?

Now, you have to use your common sense in deciding these questions, but if the wrongful expulsion caused him loss, how much was it? You would [446] have to decide it and it would be an amount which would reasonably compensate him for being wrongfully expelled.

• • •

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

PLAINTIFF'S EXHIBIT NO. 1

(Admitted in Evidence January 16, 1969)

[1]

MR. HERMAN H. WISE,
Registration No. 861,842

Plaintiff,

vs.

MR. GEORGE W. HARDEMAN,
Registration No. 1,259,097

MR. KERMIT R. BULLOCK,
Registration No. 1,205,022 and

MR. E. T. BRASWELL,
Registration No. 70,569

Defendants.

VIOLATION OF ARTICLE 13, SECTION 1,
SUBORDINATE LODGE BY-LAWS,

and

VIOLATION OF ARTICLE 12, SECTION 1,
SUBORDINATE LODGE BY-LAWS.

TRANSCRIPT OF HEARING HELD AT THE
BOILERMAKERS' UNION HALL AT 750 CONTI
STREET, MOBILE, ALABAMA, ON NOVEMBER
12, 1960, BEGINNING AT APPROXIMATELY
10:00 A.M. AND ENDING APPROXIMATELY
7:15 P.M.

APPEARANCES :

TRIAL COMMITTEE: Mr. Frank N. Goodman, Chairman
Registration No. 1,380,214

Mr. Perry Davenport
Registration No. 1,345,825

Mr. James F. Fowler
Registration No. 992,184

INTERNATIONAL REPRESENTATIVE: Mr. Charles E. Goodlin

COUNSEL FOR DEFENDANTS HARDEMAN AND BRASWELL: Mr.
Robert Dobson

WITNESS FOR PLAINTIFF: Mr. W. C. Bell

WITNESSES FOR DEFENDANTS: Mr. Rufus Raines; Mr. Alvin
Curtis Lane; Mr. Edward E. McRee; Mr. A. W. George.

WILMA A. BELL
311 Gaines Avenue
Mobile, Alabama

[2] MR. GOODMAN: Gentlemen, I declare this hearing duly opened. Gentlemen, this committee has stated its position previously as to its desire that each one receive a fair hearing in this matter. Brother Hardeman, you are charged with violation of Article 13, Section 1, Subordinate Lodge Constitution, and Article 12, Section 1, Subordinate Lodge By-Laws. Brother Davenport, would you read Article 13, Section 1 of the Subordinate Lodge Constitution?

MR. DAVENPORT: On page 93 of our Constitution, Section 1: "Section 1. Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Brotherhood or of any District or Subordinate Lodge; who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any

of its Subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood." Concluding Section 1.

MR. GOODMAN: Brother Fowler, will you read Article 12, Section 1 of the Subordinate By-Laws?

MR. FOWLER: "It shall be a violation of these By-Laws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or [3] attempt to prevent him from properly discharging the duties of his office." This is the end of Section 1.

MR. GOODMAN: Brother Hardeman, will you step forward? You have heard the charges read against you. How do you plead?

MR. HARDEMAN: Not guilty.

MR. GOODMAN: Brother Hardeman, do you have someone representing you as counsel?

MR. HARDEMAN: Mr. Robert Dobson.

MR. GOODMAN: Would you prefer that he make the statement?

MR. HARDEMAN: Yes.

. . .

[26] MR. GOODMAN: Brother Wise, will you come forward and read your charges?

TESTIMONY OF MR. HERMAN H. WISE

MR. WISE: My name is Herman H. Wise, registration number 861842. These charges as addressed to our president of Subordinate Lodge No. 112, Mr. Arl W. George. Subject: Charge and violation of Article 13, Section 1, Subordinate Lodge Constitution and Article 12, Section 1, Subordinate Lodge By-Laws, by George W. Hardeman,

Registration No. 1259097 and Kermit R. Bullock, Registration 1205022 and E. T. Braswell, Registration No. 70569. Dear Sir and Brother: Please accept this letter as a formal statement of [27] charges of violations of the above articles and sections of the Subordinate Lodge Constitution and Subordinate Lodge By-Laws, by George W. Hardeman, registration no. 1259097; Kermit R. Bullock, registration no. 1205022 and E. T. Braswell, 70569. Such violations occurred at the union's office at 750 Conti Street at approximately 10:10 A.M., on October 5, 1960, when I walked out of my office into the waiting room with W. C. Bell. At that time Mr. Hardeman raised up out of his chair and handed me a telegram and asked me to explain it. While I was reading the telegram, Hardeman, without warning, started beating me about the face and head, causing severe injury. W. C. Bell attempted to get Hardeman to stop beating me by grabbing his shoulders and asking him to stop. I did not return any of Hardeman's blows. E. T. Braswell, who is a member of this brotherhood, but not of lodge 112, then threatened Bell if he didn't quit attempting to stop the beating. In addition, Kermit R. Bullock rushed in from the front porch of the office and added his . . . Braswell said: "Bell, you keep your hands off of George or I will knock your block off." Hardeman continued to beat me about the face and head until he was exhausted. I then went back to the office 'phone and called the police. When they arrived, I went out to talk to them and then Hardeman and Bullock had left. The police officers asked me what had happened, and when I started to tell them, E. T. Braswell struck me in the face, breaking my nose, at which time the two police officers subdued him. In addition to the above violation, Kermit Bullock threatened me with assault on my health and my life, on June 22, 1960 at approximately 2:30 P.M. at the [28] job of Brock and Blevins at Scott Paper Company, Mobile, Alabama. This threat was made in the presence of Charles Trepnagier, then the international trustee of the lodge and Harold Foster, the director for Brock and Blevins on that job. Fraternally yours, Herman H. Wise. I would like to call a witness to the stand, Mr. W. C. Bell, at this time.

. . .

[29] MR. WISE: Mr. Bell, do you recall the morning of October 5 of 1960, as being in this building at approximately 10:10?

MR. BELL: I do.

MR. WISE: Do you recall me walking out of my office at approximately 10:10 on October 5, 1960?

MR. BELL: I do.

MR. WISE: Who was in the waiting room or lobby of our hall as I walked out of the office, to your best recollection?

MR. BELL: George Hardeman and Mr. Braswell.

MR. WISE: Were there anyone else in that room present other than yourself, myself, Mr. Hardeman and Mr. Braswell?

MR. BELL: Not at that time.

MR. WISE: For the record, will you tell just what happened when I walked out of my office into the lobby as I was on my way to work?

MR. BELL: As we walked out and as I approached the door, George handed you a telegram and as you attempted to read the telegram George began to hit you about the face, and I caught hold of George and tried to stop him and Mr. Braswell caught hold of me by my arm and asked me not to interfere and I stepped back.

MR. WISE: Did I strike Mr. Hardeman at any of this time?

MR. BELL: You did not.

[30] MR. WISE: Did I attempt to strike Mr. Hardeman?

MR. BELL: You did not.

MR. WISE: Did anybody else come into the room while this was taking place?

MR. BELL: Yes.

MR. WISE: Did anyone enter the door and say anything to you?

MR. BELL: Yes . . . (the witness pointed to Mr. Bullock)

MR. WISE: Mr. Bullock? He did come into the room?

MR. BELL: Yes.

MR. WISE: When he did come into the room, did you hear him say anything?

MR. BELL: I heard it, but I didn't quite understand it at that time. Mr. Bullock did say to me later as I went out the door, "I'll see you later." But he said something at that time but I didn't catch just what he said.

* * *

[31] MR. WISE: And you have the opinion that the reason you did not stop the fight that you was hindered from stopping the fight because somebody had walked up and interfered to keep you from stopping the fight?

MR. BELL: Yes.

MR. GOODMAN: Is that your statement, Brother Bell? Is that the reason you did not interfere?

MR. BELL: Yes.

MR. WISE: The reason you did not stop the fight was because you [32] was hindered from stopping the fight?

MR. BELL: Yes, I was hindered from stopping the fight.

MR. WISE: And you was hindered from stopping the fight by Mr. Braswell and then later by Mr. Bullock coming in?

MR. BELL: Yes.

MR. BULLOCK: Did I put my hands on you, Bell?

MR. BELL: No.

MR. GOODMAN: Brother Bullock, you are going to have a chance to cross-examine the witness.

MR. WISE: After that time, I come back into the office and called the police and when the police arrived, were you in the hall when the police arrived?

MR. BELL: I was.

MR. WISE: Did the policemen ask me what had happened?

MR. BELL: The police asked you what had happened and you told them about George jumping on you and me attempting to stop George from jumping on you and about Mr. Braswell interfering. When you said Mr. Braswell interfered, Mr. Braswell jumped on you then.

MR. WISE: How many times did Mr. Braswell hit me?

MR. BELL: Twice as I saw. Once on one side of the nose and once on the other.

MR. WISE: I have a statement from Patrolman Pounder, the arresting officer. "I, T. F. Pounder, patrolman, received a call to 750 Conti Street on October 5, 1960, and on arrival was told by Mr. Herman H. Wise that there had been a disturbance. He pointed out to me that one of the men involved as Mr. Braswell. He then stated that a Mr. George Hardeman had already left. While he was [33] telling me and Officer Sam Martin of the disturbance Mr. Braswell came over and hit Mr. Wise in the nose. Officer Martin and I proceeded to stop Mr. Braswell, put him under arrest and booked him for disorderly conduct, Mr. Wise was the complaint. Signed by T. F. Pounder and witnessed by Raymond G. Dominey, P. O. Box 1397, Mobile, Alabama, and Marilyn Schwartz, 53 No. Georgia Avenue, Mobile, Alabama." I would like to enter this into the record as Exhibit A. I would like for everybody to look at this. (The reporter marked the statement as Exhibit A.)

• • •

[34] MR. DOBSON: I am asking you, Brother Wise, where were you at when these people witnessed this?

MR. WISE: Officer Pounder come to my office and made this statement and his signature was witnessed by the undersigned.

MR. DOBSON: Here in the office?

MR. WISE: Here in the office.

* * *

MR. WISE: Mr. Bell, as a result of this disturbance, you did accompany me to the hospital where I received treatment for my injuries that I had received from this?

MR. BELL: Yes.

MR. WISE: You did accompany me to the court the next morning, the police court?

MR. BELL: Yes.

MR. WISE: And as for the record, I would like to state that in the police court Mr. Braswell was acquitted apparently, I don't [35] know, but apparently from his age. Mr. Hardeman had received a fine of \$25.00 and costs of court. Brother Bell, will you verify that?

MR. BELL: I will verify that.

MR. WISE: Mr. Bell, did you see Mr. Hardeman when he left the building after this had occurred that morning?

MR. BELL: I did.

MR. WISE: Did anybody leave the building with him?

MR. BELL: I didn't see anybody leave the building with him.

MR. WISE: Did you see Mr. Bullock when he left the building?

MR. BELL: Yes, immediately after George left.

MR. WISE: Immediately after George left. Did Mr. Bullock say anything to anybody or to you or anything

else after he got outside of the building pertaining to the fight?

MR. BELL: Only that he would see me later.

. . .

[37] MR. GOODMAN: Brother Bell, Brother Davenport wishes me to address a question to you. Brother Bullock made the statement that "I'll see you later." Did he say that in a threatening manner or anything?

MR. BELL: Well, the tone of voice that he was using was a threat.

. . .

MR. WISE: Mr. Bell, then the words he spoke to you was in the tone of a threat other than a friendly tone?

MR. BELL: It was. It was in the tone of a threat. I wouldn't have spoke to my brother in the tone that he spoke to me as friendly.

MR. WISE: I have no further questions.

MR. GOODMAN: Do you have any further witnesses?

MR. WISE: That is all the witnesses I have.

. . .

[50] MR. DOBSON: Brother Wise, is it your duty around here to keep law and order in this place?

MR. WISE: I have the authority to try to keep order as much as I can.

[51] MR. DOBSON: That was on Monday before the fight, wasn't it, George?

MR. WISE: What day of the month was that?

MR. DOBSON: That would be Monday, whatever day it was.

MR. HARDEMAN: The 3rd.

MR. DOBSON: The 3rd of the month you sent this man to jail, didn't you? You didn't go down and put any charges against him, did you?

MR. WISE: No, I didn't go down and put any charges against him.

MR. DOBSON: What were you doing, just harassing him? Just trying to keep him waiting here or what?

MR. WISE: No, I will get to that later.

MR. DOBSON: Why don't you get to it when I ask the question? I am cross-examining you. That was the reason for sending the man to jail?

MR. WISE: I didn't send him to jail. I called the policeman because he had come to the door and told me that he wanted a referral. I said: "Well, George, I will have to wait and see. I don't know where you are on the list. I will have to wait and see." He said: "Well, I am going to get a referral today or tomorrow or you and I are going around and around right here, out yonder or wherever it might be." I started to close the door and he tried to pull the door on me so I just come back and called the police and told them he was trying to cause some disturbance and I would like for him to be carried out. I didn't prefer charges or didn't sign a complaint because I thought George was probably mad or something.

. . .

[80] MR. DOBSON: Brother Wise, when the police came back around here, up until that time Brother Braswell hadn't done anything, had he? In other words, all of his troubles started after they were here. Is that right?

MR. WISE: Well, all that Brother Braswell did before the police come was to interfere with Mr. Bell trying to stop the fight.

MR. DOBSON: He interfered with trying to stop the fight?

MR. WISE: Mr. Bell was trying to stop the fight and Mr. Braswell walked up to Mr. Bell and told him to keep his hands off or he would do something.

. . .

[96] MR. DOBSON: This is the statement of George Hardeman. "On Saturday, Oct. 1, 1960, I talked to Leo Bonner and asked him if he had any work in the shop I could do. He said no, but he had a job in the field that he would need a good caulker on. He said the work was real

critical and the job was awful hot, but I had worked for him on jobs like this and he would like to have me and Rabbit Phillips do the chipping and caulking for him on this job. The caulking would be for the purpose of stress relieving, and the customer would watch it close. He said he would write a letter to the Local 112 Business Manager and ask for me and Rabbit on Oct. 3rd. Leo said he thought his contract gave him this privilege to specify men, on special work, if the men were available. I had borrowed a sum of money from Leo to pay my grocery bill and was glad to work for him so I could pay him back. Leo is a member of our Local and has helped a lot of our members. I left home around eleven o'clock Monday morning, Oct. 3rd, and sat in the Hall and didn't say anything to Wise at all. Wise went to dinner and when he came back he went in his office and then came back out and asked me did I want to see him. I said yes and he asked me what about. I told him about talking to Leo and he acted like he didn't know what I was talking about. I told him that I knew he had a telegram asking for me, and I was ready to go to work. Wise said he didn't know if he would send me or not. I tried to show him on the work list where he had sent one man below me on a job and he said he was not going to send me on this job. I told Wise then, "You know I need to work and if you don't give me a referral, me and you are going round [97] and round." He slammed the door, went in and called the police, and when they came he told them I was drunk and had been there raising a disturbance all day. He pointed out Curly Lane on the sidewalk and told the police to take him too. The police talked to Lane on the walk, but did not take him. The police carried me down and one of them asked me what that man had against me by trying to put a drunk charge against me when I wasn't drunk. The police turned me loose. On Tuesday, Oct. 4th, I stayed at the hall all day waiting for a referral, but I didn't get it. I called Leo Bonner that night and asked him if he still wanted me to come to work. He said yes, if I had a referral, but he couldn't put me to work without it. He said he didn't want to have a dispute on his job because his working time was too short. I went to the hall Wednesday, October 5th, and

waited from the time the hall opened until we had the trouble. I tried to make up my mind what to do, whether to sue the Local or Wise or beat hell out of Wise, and then I made up my mind. I had talked to Kermit Bullock and Robert Dobson and they asked me not to have any trouble. I said I had been done dirty enough in this Local and I couldn't take any more mistreatment. I told them about the call for me and that I was going to ask Wise for an explanation and if I didn't get it we were going to have hell. Bullock asked me then not to start any trouble. I went in and sat down and waited for Wise to come out of the office. At the time, Wise had Bell in the office with him, and I believe Bell had offered to give Wise a hand with me if Wise would give him a job. If he hadn't made an agreement with Wise, Bell would not have grabbed [98] me around the waist and held my arms when the fight started. I had asked Wise why he didn't send me on the job, when I knew he had a telegram asking for me. He said, "I don't have to explain to you, that's my business, I just didn't send you." Then the fight started. Bell grabbed me and I hollered, 'Don't hold me and let that man hit me, Bell', but he kept holding me. While Bell was holding me, Wise hit me two or three times in the face, skinning my right cheek, and making a bruised place on my jaw. Wise also hit me three or four times in the chest. Mr. Braswell had asked Bell several times to turn me loose, and not hold me while Wise was hitting me, and Bell finally turned me loose. Wise started hollering, 'Don't hit me no more, I won't skip you no more, I'll give you what's coming to you if you won't hit me no more.' I told Wise, O.K. The fight was over and then we were just arguing and Bullock came in and told me, 'Cut it out George and get out of here.' Bell started toward me again and Bullock told him to stay out of it, that he was not a member of our Local and it didn't concern him. Neither Mr. Braswell or Bullock threatened Bell and they didn't even speak to Wise. Then I asked Bullock to take me home. Wise sent all the men on the job that Leo asked for except me and Grover Ferguson. At least two of the men he sent, and I know it's true, were way below me on the work list, according to the letter which was received

from the International. One man was sent as steward and made foreman after he got on the job. I have only worked eleven days this year, as the records will show. How can any man say I don't have a right to a moral obligation to my family [99] and shouldn't stand up for my legal right to work in order to support them? George Hardeman." Do you want to leave this on the record, George? Do you have a duplicate, George?

MR. HARDEMAN: Yes:

. . .

[101] TESTIMONY OF MR. RUFUS RAINES

. . .

MR. DOBSON: . . . Brother Raines, on the morning this rabble started about ten or eleven o'clock on October 5th, will you just tell the committee there what you actually saw. In other words, in your own words. Don't add anything and don't take anything off—where you was at when it started—where you was at when it ended and everything that took place.

MR. RAINES: On Monday morning now?

MR. DOBSON: I said on October 5th, the date the fight started.

MR. RAINES: Well, I was sitting inside the hall in here in a chair when Brother Hardeman come up and he showed me a telegram.

MR. DOBSON: Just confine it to what actually happened from the fight on—like Brother Wise walking out of the door.

MR. BULLOCK: He ain't heard the charges.

[102] MR. GOODLIN: Let him proceed anyway he wants.

MR. DOBSON: Well, I mean, he could start back two weeks before it happened. I want to make this . . .

MR. GOODLIN: Start the day it happened. He's going along the right track.

MR. RAINES: Well, he just passed a telegram around there and I saw it and read it and said "That's okay." I handed it back to him and you come in and he showed it to you and Brother Bell was sitting there and he showed it to him and said, "See if this won't get my referral, and if it won't, we're going round and round." So, later on Bell come in and stayed back here thirty minutes, I guess, or longer and then I finally walked outside. You and Kermit Bullock walked on off in front of that lady's house and sat down on the curbing. I turned on the porch there and was talking to another, I believe it was Barney Gamble, about some tank jobs and I turned around and looked and there was Brother Hardeman and Brother Bell and Brother Wise standing there and he handed Wise a telegram there and started talking loud and I saw George whenever he popped him. Then Brother Bell ran in there and grabbed him and was holding him there, and I believe, the way it looked to me, Brother Wise was going to stack a whipping on him while Bell held him and I opened the door and come inside . . .

MR. WISE: I object to this statement . . .

MR. DOBSON: Let him make his statement. Let him make his statement and then you can cross-examine him.

MR. RAINES: . . . because I was not going to see one man hold [103] another while the other one whipped him. I won't stand for that. I will even get two dogs off of another. I saw Brother Braswell; he got up and walked around over there and told Brother Bell to turn him loose and he did so and Braswell returned back to his seat there, and Brother Wise and Hardeman scuffled around there a little more and he told Hardeman to "Go on and leave me alone. I won't jump you no more," and then that was all over with. I was there and Robert Dobson, Brother Bullock walked in there and Brother Bullock said, "Come on, George, and get out of here. You have already caused enough trouble."

. . .

[108] MR. WISE: You saw—how many words were

passed before he handed me that telegram? What did he say?

MR. RAINES: Well, now I didn't count the words. It would be impossible. I'm no tape recorder to interpret how many words was said. He was standing there at the door waiting for you to come out to show you the telegram and you come out with Brother Bell and he handed the telegram to you.

MR. WISE: What did he say when he handed it to me?

MR. RAINES: I don't recall just what he did say . . .

MR. WISE: What were some of the words he said?

MR. RAINES: Some of the words he said? I don't know just what he said, but he did say, "If this don't get me a referral, we're going round and round."

MR. WISE: That's what Brother George told me when he handed me the telegram? Thank you. No further questions.

. . .

[112] TESTIMONY OF
MR. GEORGE W. HARDEMAN

MR. DOBSON: Brother Hardeman, tell them what happened on October 3rd, that was on Monday, as to who was here, what words you might have had; just the whole thing in general.

MR. HARDEMAN: Well, I left the house somewhere between eleven and twelve o'clock. Curley Lane had come by the house and drove down with me. We come down together. Also, a boy that don't even belong to the local. He rode down with us. I talked to Leo and Leo told me that if I could come on down and if I could get the referral, I could go to work that evening unloading material, with him, helping him. I asked Brother Wise—I sat [113] in there. Brother Wise went out to dinner and I hadn't even spoke to him. He came back from dinner and walked back here in the office and in just a

few minutes, I don't know who told him that I wanted to see him, because there was twelve or fifteen guys sitting in there. I had walked to the water fountain to get a drink of water. Brother Wise opened the door. He said, "George, do you want to see me?" I said, "Yes." He said, "What do you want to see me about?" I said, "Well, I want to see you about a referral to go to work with Leo," and I tried to explain to him. He told me, he says, "I don't know whether I am going to send you on this job or not." He said, "I haven't made up my mind." He said, "You are too far down the list" or something like that. That is where I referred him to the out of work list. I asked him—I said, "Did you say I'm too far down the list? Why did you send these guys?" I called him out there to show it to him. He wouldn't come and look at the work list. He slammed the door. I sat down in a chair. Two policemen walked in. I spoke to them. I knowed one of them. I spoke to them. I said, "You all hunting the business manager?" I didn't know he had called the law. Before then, I told Brother Wise this: I don't deny it. I said, "Brother Wise, you know that I need to go to work. I've got kids in school. I've only worked eleven days this year." He knowed that I needed to go to work. "Now if you don't send me on this job, me and you is going round and round." He says, "Is that a threat?" I said, "Well, I don't know as I'm threatening you. I'm just telling you that we're going round and round, in that office or that office in there [114] or out in the street, but if I don't make this job, me and you is going round and round." Then, he slammed the door; come in here and called the police. . . .

* * *

[136] (Mr. Bullock continues reading his statement) "On the morning of October 5, 1960, I was mowing the lawn when Brother Thomas Ray Jones stopped by my home and asked me to go to town with him, that he might need my assistance on securing a loan on his home. We stopped by the local at 750 Conti Street, arriving around 9:30 A.M. Sometime later Brother George Hardeman came

up to where Brother Robert Dobson and myself and Brother Barney Gamble, another member of the local union, were sitting in front of the house next door to the hall. Brother Hardeman pulled a telegram out of his pocket and handed it to Brother Dobson and asked him what he thought of it. After he finished reading the telegram, Brother Dobson passed it to me and I read it. While I was reading the telegram, Brother Dobson was making some remarks to Brother Hardeman which went something like this: 'Brother Hardeman, I don't want to see you get in trouble over this and it is my advice to you to forget it and not have any [137] trouble concerning this telegram.' I spoke up and said, 'Yes, George, Dobson is right. There is no need getting in trouble about something like this.' Brother Hardeman told Dobson and myself, 'Well, I'm not going to get in trouble about it, but I am going to ask the business manager to explain to me why he did not send me on this job as requested by this telegram.' Brother Hardeman then went into the hall. Quite awhile later, Brother Dobson and myself were still sitting in front of the house next door to the hall when I noticed some members going up on the porch of the hall in a hurry and then I heard some loud talking coming from the hall. Brother Dobson and I both went in the hall and when I arrived on the scene they had quit fighting but Brother Hardeman was talking to the business manager in a loud tone of voice, saying something to this effect: 'Let this be a lesson to you, Wise, and don't jump me any more on the work list.' I did not see any blows passed and I told Brother Hardeman, 'Cut it out, George, and get out of here.' W. C. Bell made a move as if to interfere and I told him, 'Bell, you don't have any say coming.' Brother Hardeman left the hall at that time and I followed him out. . . .

. . .

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

PLAINTIFF'S EXHIBIT No. 2

(Admitted in Evidence January 16, 1969)

(61) For (36) Against	Parties guilty as charged. (61) Sixty-one to sustain (36) Thirty-six to reject
59 Yes 36 No	Motion by C. M. Morgan and by W. H. Henderson that K. R. Bullock, George W. Hardeman & E. T. Braswell be ex- pelled indefinitely from the organiza- tion.

M. C.

. . .

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

PLAINTIFF'S EXHIBIT No. 5

(Admitted in Evidence January 16, 1969)

AIR MAIL—CERTIFIED

RETURN RECEIPT REQUESTED

L-112-60-14

December 19, 1960

Mr. George W. Hardeman
610 Ferreil Street
Crichton Station
Mobile, Alabama

Dear Sir:

Under date of December 5, 1960, under the provisions of Article XIV, Section 2(f), Subordinate Lodge Constitution, you filed with me an appeal from the unanimous decision of a Trial Committee appointed by the President of Lodge #112 to hold a hearing on charges filed against you by Business Manager H. H. Wise of Lodge #112

and the penalty assessed against you by action of Lodge #112.

Section 2(f), Article XIV, Subordinate Lodge Constitution, of course, provides that such appeals will be filed through the Financial Corresponding Secretary of the Subordinate Lodge; however, your appeal as filed is accepted by the International President for decision.

Charges were filed against you by Business Manager H. H. Wise for violation of Article XIII, Section 1, Subordinate Lodge Constitution, and Article XII, Section 1, Subordinate Lodge By-Laws. The complete file in this case, including the transcript of the trial proceedings, has been referred to me and I have carefully reviewed the entire matter.

The record indicates you were given full opportunity at the hearing to present witnesses and make a full statement as to your position, with the result that the Trial Committee in its report to the Local Lodge unanimously found you "guilty as charged."

The Local Lodge sustained the report of the Trial Committee, and the penalty for the finding of "guilty" of a violation of Article XIII, Section 1, Subordinate Lodge Constitution, is set by the Constitution as expulsion from the International Brotherhood.

From the records furnished to me, the provisions of Article XIV, Subordinate Lodge Constitution, have been followed by the Local Lodge in the receiving of these charges and the conduct of the hearing.

Your stated objections on the basis of your appeal were that "Robert's Rules of Order were not carried out as it takes two-thirds majority of those present to expel any member."

While Article XV, Section 2, International Lodge Constitution, does provide that Robert's Rules of Order shall be the parliamentary law for the International Brotherhood, the procedure on trials, penalties and appeals is fully covered in Article XIV, Subordinate Lodge Constitution, therefore, the provisions of the Subordinate Lodge Constitution prevail and do not require a two-thirds vote.

I find that Local Lodge #112 carried out the provisions

of Article XIV, Subordinate Lodge Constitution, in the conduct of the trial on the charges preferred against you and I find nothing in the transcript nor in your appeal to cause me to reverse the unanimous decision of the Trial Committee of "guilty as charged" nor the action of the Subordinate Lodge in sustaining the report of the Trial Committee.

Your appeal, therefore, is denied and the action of the Local Lodge and your expulsion from membership in the International Brotherhood and Subordinate Lodge #112 is sustained.

Yours truly,

/s/ William A. Calvin
International President

cc:

H. E. Patton, IST
C. W. Jones, IVP
C. E. Goodlin, IR
Arl W. George, L-112
H. H. Wise, L-112

oeiu # 320 afl-cio

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

PLAINTIFF'S EXHIBIT NO. 16

(Admitted in Evidence January 16, 1969)

Lafayette Motel
Long Beach, California

AIR MAIL—CERTIFIED

RETURN RECEIPT REQUESTED

April 19, 1961

Mr. George W. Hardeman
225 Columbia Avenue
Mobile, Alabama

Re: Appeal from decision of International President on
action of Lodge #112 on charges filed by H. H. Wise.

Dear Sir:

On December 30, 1960, you were advised that a panel of the International Executive Council had been designated to hold hearing on your appeal dated December 27, 1960, from the decision rendered by International President William A. Calvin dated December 19, 1960.

President Calvin's decision on December 19, 1960, was the result of an appeal by you to the International President from the action of Lodge #112 on the report of the Trial Committee which conducted a hearing on charges filed against you by Business Manager H. H. Wise of Lodge #112.

Based upon the report of the Trial Committee to the Local Lodge of "guilty as charged," a penalty was assessed by the Local Lodge of expulsion from the International Brotherhood. President Calvin's action was to deny your appeal and to sustain the action of Lodge #112.

At a meeting of the Executive Council held at Long Beach, California on Wednesday, April 19, 1961, the panel of the Executive Council reported to the Council on the investigation conducted at Mobile, Alabama on March 28,

1961. The Executive Council reviewed the entire file and the report of the panel; and you are advised that the Executive Council unanimously adopted the following action.

April 19, 1961

Mr. George W. Hardeman

ACTION: That the International Executive Council concur in the report of the panel on the appeal of George W. Hardeman and that the Executive Council deny the appeal and sustain the decision of International President William A. Calvin dated December 19, 1960, upholding the action of the Local Lodge in assessing a penalty of expulsion from membership in the International Brotherhood of George W. Hardeman.

Yours truly,

/s/ HOMER E. PATTON
International Secretary-Treasurer

cc:

J. A. Grant, IVP
C. W. Jones, IVP
J. P. McCollum, IVP
W. H. Shahane, IVP
H. H. Wise, L-112

oein #320 afl-cio

Four Page Booklet

(Admitted in Evidence January 17, 1969)

BOILERMAKERS LOCAL No. 112
UNEMPLOYED REGISTRATION CARD

INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, BLACKSMITHS, IRON
SHIP BUILDERS, FORGERS AND
HELPERS

Local No. 112

This card is issued by Boilermakers Union Local 112 to facilitate the recording of unemployed members and applicants who are available for work.

When member or applicant is referred to employment this card must be deposited at Local Union Office, Room 405, 118 N. Royal Street, Mobile, Alabama.

1. Unemployed members and applicants shall register on the out of work list.
2. All unemployed members and applicants shall register each month that they are available for employment or their name shall be removed from out of work list until they report they are again available for employment.
3. All unemployed members and applicants who reside more than forty (40) miles from the City of Mobile, Alabama, may mail their Card in for registration. (Exclude 4 cents for return postage.)
4. Any member or applicant registering employment in the Classification as registered in shall have his name placed at the bottom of the out of work list as provided for in Art. IV, Sec. 2-B of the Joint Referral Committee Rules, Regulations and Standards.
5. No member or applicant shall be registered or referred to employers before 8:30 a.m. or later than 3:00 p.m., except in an emergency.

George Hardeman

Name of Member or Applicant **GA 6-1219**

BOILERMAKERS LOCAL No. 112

Per 403 Miller Bldg.
11 4. Royal Street Mobile, Alabama
Helmick 2-6729

Address _____ Telephone No. _____
Signature of Officer Reported To _____

[illegible]

* Initial of Officer Reporting

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

DEFENDANT'S EXHIBIT NO. 4
Local Lodge Bylaws

(Admitted in Evidence January 17, 1969)

• • •

XII. OFFENSES & PENALTIES

In addition to the offenses and penalties set out in the applicable provisions of the International and Subordinate Lodge Constitution, the following offenses and penalties shall be observed in this Subordinate Lodge, and any member who violates same shall, if found guilty after proper hearing as provided herein, be punished as warranted by the offense.

(1) It shall be a violation of these By-Laws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office.

• • •

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

DEFENDANT'S EXHIBIT NO. 5

Sub: Lodge Constitution

(Admitted into existence January 17, 1969)

• •

ARTICLE XIII

Offenses and Penalties

1 Section 1. Any member who endeavors
2 to create dissension among the members; or
3 who works against the interest and harmony
4 of the International Brotherhood or of any
5 District or Subordinate Lodge; who advo-
6 cates or encourages the division of the funds,
7 or the dissolution of any District or Subor-
8 dinate Lodge; or the separation of any Dis-
9 trict or Subordinate Lodge from the Inter-
10 national Brotherhood; who supports or
11 becomes a member of any dual or subversive
12 organization; who shall be hostile to the
13 International Brotherhood or to any of its
14 Subordinate Lodges or to any of its
15 to the principles which is antagonistic
16 national Brotherhood purposes of the Inter-
17 thereof be expelled, shall upon conviction
18 International Brotherhood by expulsion from the
brotherhood.

• •

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

GEORGE W. HARDEMAN,

Plaintiff,

vs:

THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON
SHIPBUILDERS, BLACKSMITHS, FORGERS AND
HELPERS, an unincorporated association.

Defendant.

Civil Action No. 4038-66

JUDGMENT, INCLUDING JURY VERDICT

[Filed January 17, 1969]

On this date into open court comes the plaintiff and the defendant by and through their attorneys, and the Petit Jury who were duly empaneled and sworn according to law on the 16th day of January, 1969, and the trial of the case is resumed.

Witnesses are examined and exhibits offered in evidence on behalf of defendant and defendants rests.

Witnesses are examined in re-buttal and exhibits offered on behalf of plaintiff, and all parties rests.

Arguments are heard, the Court charges the Jury, and the Jury retires to consider its verdict.

Now comes the Jury, who having heard the evidence, the arguments and the charge of the Court, upon their oaths do say:

"We, the jury find for the Plaintiff, GEORGE W. HARDEMAN and against the DEFENDANT, THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, an unincorporated association, and assess his damages at \$152,150.

A. GLENN JERNIGAN
Foreman."

It is therefore ORDERED and ADJUDGED by the Court that a judgment be, and the same hereby is, entered in favor of the plaintiff, GEORGE W. HARDEMAN, and against the defendant, THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP-BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, an unincorporated association, in the sum of ONE HUNDRED FIFTY-TWO THOUSAND, ONE HUNDRED & FIFTY (\$152,150.00) DOLLARS, and the defendant is hereby taxed with costs of court.

DONE at Mobile, Alabama this the 17th day of January, 1969.

DANIEL E. THOMAS
Chief Judge.

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 28012
Summary Calendar

GEORGE W. HARDEMAN, *Plaintiff-Appellee*

v

**THE INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS,
FORGERS AND HELPERS, AFL-CIO, *Defendant-Appellant.***

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF ALABAMA.**

(DECEMBER 22, 1969)

**Before THORNBERRY, MORGAN and CARSWELL,
Circuit Judges.**

PER CURIAM: Pursuant to Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See *Murphy v.*

Houma Well Service, 5 Cir., 1969, 409 F. 2d 804, Part I; and *Huth v. Southern Pacific Company*, 5 Cir., 1969, — F. 2d —, Part I [No. 27439, Oct. 7, 1969].

Appellee Hardeman brought this action against the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, seeking damages under the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 401, et. seq., for unlawful expulsion from the Union. The jury returned a verdict in favor of appellee in the amount of \$152,150.00 and the District Court entered a judgment in that amount.

The Union appeals, raising many of the same issues decided against it in *International Bro. of Boilermakers, Etc. v. Braswell*, 388 F. 2d 193 (5th Cir., 1968), a case arising out of the exact factual situation as that involved in the present case. The Braswell case is dispositive of those issues. We have carefully considered appellant's other specifications of error and find them to be without merit.

The judgment of the District Court is

AFFIRMED.

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 23776

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, *Appellant*,

v.

E. T. BRASWELL, *Appellee*.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF ALABAMA.**

(JANUARY 12, 1968.)

Before WISDOM and GODBOLD, Circuit Judges, and
McRAE, District Judge.

WISDOM, Circuit Judge: In this action against the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, the plaintiff, E. T. Braswell, alleges that he was wrongfully expelled from the Union. He asserts that this expulsion

was in violation of his rights under the "Bill of Rights of Members of Labor Organizations" of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 401 et seq. He relies particularly on 29 U.S.C. § 411(5):

(5) Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) given a full and fair hearing.

(b) any provision of the constitution and by-laws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

Braswell seeks compensatory and punitive damages only, and not reinstatement. The jury returned a verdict in favor of the plaintiff in the amount of \$12,500, and the Court entered a judgment in that amount. The Union appeals. We affirm.

* * *

Braswell has been a member of the International since 1909, and at the time of his expulsion was a member in good standing of Local 112 in Mobile, Alabama. In the fall of 1960 there was considerable dissension in the Union over the local business manager's allegedly discriminatory assignment of jobs.¹ On October 5, 1960, the business manager, Herman B. Wise, after reading his morning mail, left his office for a local plant where he intended to engage in union business. As he walked out, George Hardeman, one of the members of the Union, met him, handed him a telegram and asked Wise, "Can you ex-

¹ The chronology of events is unclear in the record and in the briefs; the parties are not in agreement as to any of the dates. We have tried to reconstruct the sequence from the testimony offered at the trial, insofar as possible. Any inaccuracies, however, are not relevant to the issues before this Court.

plain this to me". Before Wise could finish reading it, Hardeman struck him in the face. Several other members were "standing around". One clutched at Hardeman, but another threatened to "drop him in his tracks" if he did not release Hardeman. Braswell took no part in the actual fighting but remarked to the man holding Hardeman, "You keep your hands off of him." The police were called. As Wise recounted the incident to a police officer, he pointed to Braswell and said, "And this man was standing here." At this point Braswell struck Wise in the face, breaking his nose.

Wise charged Braswell, Hardeman, and another member with violations of Article 13, Section 1 of the Subordinate Lodge Constitution² and Article 12, Section 1 of the Subordinate Lodge Bylaws.³ A local trial panel

² Article XIII, Section 1:

"Any member who endeavors to create dissention among the members; or who works against the interest and harmony of the International Brotherhood or of any District or Subordinate Lodge; who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its Subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood."

³ Article XII, Section 1:

"In addition to the offenses and penalties set out in the applicable provisions of the International and Subordinate Lodge Constitution, the following offenses and penalties shall be observed in this Subordinate Lodge, and any member who violates same shall, if found guilty after proper hearing as provided herein, be punished as warranted by the offense. "(1) It shall be a violation of three By-Laws for any member through the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office.

• • •

conducted a hearing on the charges, found Braswell guilty, and ordered his expulsion. Upon the recommendation of the Union Board the members approved the verdict. He appealed to the Executive Council of the International Union. After another hearing, the Council affirmed the decision of the trial board. Braswell made a final appeal to the President of the International. This appeal was also rejected. He was then formally expelled from the Union. None of these decisions states whether it is based on both or only one of the violations charged. On September 12, 1963, Braswell filed an amended complaint in the district court alleging that the expulsion was wrongful under LMRDA and asking for damages.

I.

Jurisdiction

The Union challenges the jurisdiction of the district court over the subject matter on the ground that the National Labor Relations Act, 29 U.S.C. § 151 et seq. preempted the cause of action.

There may be certain ambiguities in LMRDA, but the act does unequivocally state that the rights secured by the bill of rights are to be enforced through private suits and that such suits shall be brought in the district courts.⁴ Section 102 of the LMRDA, 29 U.S.C. § 412, provides:

Civil action for infringement of rights; jurisdiction:
Any person whose rights secured by the provisions of this subchapter have been infringed by any violation

⁴ Earlier versions of the legislation had provided for enforcement of the bill of rights by the Secretary of Labor and for criminal penalties for the unions and union officials who committed such violations of their provisions. In the final version, Congress left enforcement of these rights entirely to private suits. See Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 Minn. L.Rev. 199, 216-17 (1960).

of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

At the same time, under Section 103, 29 U.S.C. § 413, union members retain whatever rights and remedies they may have "under any State or Federal law or before any court or other tribunal, or under the Constitution and Bylaws" of their unions.

The Union relies on *San Diego Building Trades Union v. Garmon*, 1959, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775. In *Garmon* the Court held:

"When an activity is *arguably* subject to § 7 and § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245. (emphasis added).

The Union suggests that the expulsion of Braswell was "*arguably*" and unfair labor practice under the NLRA, and that exclusive jurisdiction therefore lies with the NLRB. This assertion is erroneous on two counts.

First, the purpose of the *Garmon* rule is to prevent conflicts between federal and state policy. Here, if there is any conflict at all, it is between two federal organs expressing federal policy, and Congress has declared that federal courts, and not the National Labor Relations Board are to have the primary role. "*Garmon* . . . merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations. . . . The purpose of Congress is the ultimate touchstone." *Retail Clerks International Association v. Schermerhorn*, 1963, 375 U.S. 96, 103, 94 S.Ct. 219, 11 L.Ed.2d 179.

Second, the cause of action here involved is not arguably subject to the jurisdiction of the Board. When a dispute is solely between the member and his union and does not directly concern rights granted by the NLRA, the preemption doctrine does not come into play. *International Association of Machinists v. Gonzales*, 1958, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018; *Local 100, United Association of Journeymen and Apprentices v. Borden*, 1963, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed.2d 638; *Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko*, 1963, 373 U.S. 701, 83 S.Ct. 1429, 10 L.Ed.2d 646. See also *Vaca v. Sipes*, 1967, 386 U.S. 171, S.Ct. , 17 L.Ed.2d 842.

The question is one of congressional intent—did Congress intend to give the NLRB exclusive primary jurisdiction over the subject matter? In both *Borden* and *Perko* the Court answered “yes”. But neither the preemption doctrine nor the primary jurisdiction doctrine has constitutional bases. A clear indication therefore of congressional intent to confer jurisdiction on the federal district courts to award damages for actions—even if these actions were arguably violations of the NLRA and within the jurisdiction of the NLRB—would control.⁵

The result is in accord with other federal courts which have passed on the question. See *Addison v. Grand Lodge of International Association of Machinists*, 9 Cir. 1962, 300 F.2d 863; *Parks v. International Brotherhood of Electrical Workers*, 4 Cir. 1963, 314 F.2d 886, 922-3, cert. denied, 372 U.S. 976; *Rekant v. Shohtay-Gasos Union Local 446, Amalgamated Meat Cutters and Butcher Workmen*

⁵ For many years, before the passage of LMRDA, state courts heard suits by union members against their unions alleging that they had been unfairly disciplined or expelled. See Summers, *The Law of Union Discipline: What the Courts do in Fact*, 70 Yale L.J. 175 (1960). There is nothing here to indicate an unfair labor practice under the NLRA that would bring the Garmon doctrine into play.

of North America, 3 Cir. 1963, 320 F.2d 271, 273-75; *Grand Lodge of International Association of Machinists v. King*, 9 Cir. 1964, 335 F.2d 340, 346-47; cert. denied, 379 U.S. 920; *Burns v. United Brotherhood of Carpenters and Joiners of America, Local 626*, D. Del. 1962, 204 F. Supp. 599, 601-02.⁶

The appellant's attempt to argue that the conduct of which appellee complains constitutes an unfair labor practice (coercion of an employee in the exercise of his rights or of an employer to discriminate) is of no relevance. Even if the conduct is arguably subject to the NLRA (which is doubtful), it is *also* a violation of the LMRDA Act. A clear Congressional directive that federal courts have jurisdiction to entertain suits for damages has precedence over application of the primary jurisdiction rule. We hold that the district court had jurisdiction of this action under Section 412.⁷

II.

Jury Trial

In his amended complaint, Braswell demanded a trial by jury. The Union made a timely motion to strike this demand. The district court denied the motion, and the case was heard and decided by a jury. The Union renews here its objection to the jury trial.

⁶ In *Barunica v. United Hatters, Cap and Millinery Workers, Local 55*, 8 Cir. 1963, 321 F.2d 764, a complaint alleging that the union had unlawfully failed to refer the plaintiff out on employment was dismissed as not stating a cause of action under LMRDA, the court noting that it was properly an unfair labor practice cognizable before the NLRB. See *Thatcher, Rights of Individual Union Members Under Title I and Section 610 of the Landrum-Griffin Act*, 52 Georgetown L.J. 339, 361-62 (1964).

⁷ The very union which is appellant here has defended other suits brought under the jurisdiction of § 412. *Vars v. International Brotherhood of Boilermakers*, D. Conn. 1962, 205 F. Supp. 943 *affirmed*, 2 Cir. 1963, 320 F.2d 576; *International Brotherhood of Boilermakers v. Rafferty*, 9 Cir. 1965, 348 F.2d 307.

The Act itself does not indicate whether a jury trial is to be granted for suits under Section 412. The language of the jurisdictional grant, that "such relief (including injunctions) as may be appropriate" may be afforded indicates that Congress contemplated the entire range of remedies, both legal and equitable. Braswell sought only damages; he did not ask to be reinstated in the Union which had expelled him. In traditional terms, then, his cause of action was purely "legal" in nature.

We find only two federal cases on the question whether a jury trial is required in an action for wrongful expulsion under LMRDA. In *McCraw v. United Ass'n of Journeymen and Apprentices*, 1965, 341 F.2d 705, 709-10, the Sixth Circuit held that a section 412 proceeding was one unknown at common law, and therefore not within the guarantee of the Seventh Amendment. The Court characterized the proceeding as one in equity for reinstatement, with damages merely an incident to relief, and therefore held that a jury trial was not proper. In *Simmons v. Avisco, Local 713, Textile Workers Union of America*, 1965, 365 F.2d 1012, the Fourth Circuit rejected the *McCraw* holding. Judge Sobeloff, for the Court, held that although LMRDA created new rights, and the cause of action was partly equitable, the plaintiff did not lose the right to a jury trial:

The right asserted is indeed one created by statute, but we do not agree that a jury trial is necessarily unavailable because the suit for damages is one to vindicate a statutory right. There is no such cleavage between rights existing under common law and rights established by enacted law, where the relief sought is an award of damages. [citing cases and authorities]

The plaintiff here is suing at both law and in equity. He seeks an injunction to effect his restoration to membership. He also seeks money damages for injury to reputation, and resulting mental anguish—a cause of action of which the developing common law of torts certainly takes cognizance. We see no reason for not

allowing a jury to determine whether the union's wrongful conduct was the proximate cause of the plaintiff's injuries and how much the plaintiff is entitled to recover therefor. . . . Where issues underlying equitable and legal causes of action have been exactly the same, the Supreme Court has been careful to preserve a litigant's right to jury trial on the factual issues, even where a stronger basis was presented for equitable than for legal relief. See *Dairy Queen v. Wood*, 1962, 369 U.S. 469, 473, 82 S.Ct. 894, 8 L.Ed.2d 44; *Thermo-stich, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961).

We find Judge Sobeloff's reasoning persuasive. We need not decide, however, whether a plaintiff is always entitled to a jury trial in a section 412 action seeking both legal and equitable relief. Here, where the plaintiff prays for money damages only, the action cannot be characterized as one for reinstatement with money damages as incidental. Here he should be entitled, at his request, to have a jury determine whether the Union's wrongful conduct was the proximate cause of his injuries and the amount of his damages. The district court correctly denied the Union's motion to strike the jury trial demand.

III.

The Expulsion

Braswell does not deny that he struck Wise in the face and broke his nose. The question is whether this act constituted a violation of the Union Constitution and Bylaws that would justify his expulsion.⁸ As noted, the Union

⁸ Section 101(a)(5) of the LMRDA provides that, except for non-payment of dues, no union member may be "suspended, expelled, or otherwise disciplined" unless he has been "(A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." Several of the twelve counts in Braswell's amended complaint alleged procedural defects in the manner of selection of the union trial board,

charged Braswell
out in footnotes
returned a general

whether Braswell's violations of two provisions, set
tions. Since the union trial board simply
Section 1 and if guilty, without specifying
tion 1 of the bylaws or only one of the sec-
affixed is of no mandatory under Article XIII,
board's finding is possible under Article XII, Sec-

The district court, by the offense, the penalty
was no evidence determining the scope of the trial
Article XIII of

we agree with the court as a matter of law that there
to rule on whether a finding of guilt under
bylaws, because the union trial board's action. For reasons to be stated,
the expulsion is invalid. The district court declined
In view of the fact that the union trial board violated Article XII of the
to specify by what evidence in the record that
in his defense, "conviction" under that article.
invalid. While the first charge and the failure
violation of the union trial board, Braswell was prejudiced
Section 411(5) and the expulsion was therefore
that, under the union trial board's specificity might constitute a
valid under the union trial board's due process guaranteed by
"[A] union trial board's same result on the ground
fenses stated that Braswell's expulsion was not
courts lack the union trial board's constitution mentioned in the charges.
713, 350 F.2d 1102 (9th Cir. 1965) due its members except for of-

This Court recognizes 'implied offenses' and
in *Allen v. International Union of Marine and Shipbuilding Workers of America*, 394 U.S. 169, 80 S.Ct. 100, 20 L.Ed.2d 196 (1965).
the notice given to the complainant in the hearing was not sufficient to constitute a violation of the constitution." *Simmons v. Local Union No. 100, International Brotherhood of Teamsters*, 394 U.S. 155, 80 S.Ct. 98, 20 L.Ed.2d 196 (1965).

very similar question recently
in *Union of Theatrical, Stage Em-*
well took no exception to the trial, the manner in which the
them here, the union trial board's action of the trial board by Wise,
it ruled against Braswell on several
rule either way on others. As Bras-
well's rulings below, and does not contest
it before this court.

ployees and Moving Picture Operators, 5 Cir. 1964, 338 F.2d 309. Allen was expelled from his union on a charge that he had violated a provision of the constitution which, by its terms was inapplicable to him. The evidence, however, established that he was guilty of violating another provision of the constitution, but he was not charged under that provision. In affirming the judgment of the district court, finding the expulsion unlawful and awarding reinstatement and damages, we stated:

"It is well established that penal provisions in union constitutions must be strictly construed. In *McCraw v. United Ass'n of Journey [sic] & App. of Plumbing etc., Inc.*, [sic] E.D.Tenn. 1963, 216 F.Supp. 655, 662, a decision under the Landrum-Griffin Act, the Court pointed out: "In determining whether discipline was properly imposed *** any ambiguity or uncertainty in the constitution must be construed against the union and in favor of the member, in accordance with well established principles of documentary construction.'" 338 F.2d at 316.

Here, as in *Allen*, we also rely on *Vars v. International Brotherhood of Boilermakers*, 2 Cir. 1963, 320 F.2d 576, 578. There the court observed:

"[I]mplicit in the requirement of a full and fair hearing is the requirement that there be some evidence to support the charges made. . . . Thus, although the courts may be without power to review matters of credibility or of strict weight of the evidence, a close reading of the record is justified to insure that the findings are not without any foundation in the evidence."

Applying these principles to the undisputed underlying facts we find that the act charged to Braswell was a blow struck in anger, and nothing more. However reprehensible this act may be, it did not constitute a violation of the provisions in the charges. Article XIII, Section 1 of the constitution on its face is directed as threats to the union as an organization and to the effective carrying out of

the union's aims. Braswell's fist was not such a threat. Article XII, Section 1 of the bylaws proscribes the use of force or violence where the purpose of such force is to prevent an officer of the union "from properly discharging the duties of his office." There is no evidence that Braswell was motivated by this purpose when he struck Wise. Accordingly, we affirm the ruling of the district court that the expulsion was unlawful under Section 411(5).

IV.

Compensatory Damages

The trial judge charged the jury that if it found that Braswell had suffered any actual damages as a proximate result of his unlawful expulsion, he should be awarded an amount to compensate him for such loss. Compensatory damages are proper relief for an unlawful expulsion under LMRDA. See *Simmons v. Avisco, Local 713, Textile Workers Union*, 4 Cir. 1965, 350 F.2d 1012. As the jury was instructed also on punitive damages, discussed below, and brought in a general verdict, without stating what amounts were allotted to the two types of award, we must assume that some part may have been compensatory. The Union asserts that there was insufficient evidence on the record to support an award of compensatory damages. It is true that Braswell's claim that he lost union insurance and welfare rights was sufficiently countered by testimony and documents showing that he was not eligible, even had he remained a member, but there was testimony regarding the average earnings of a boilermaker, that non-union members would find difficulty in securing work, and regarding Braswell's earnings before and after his expulsion, from which the jury might have found that he was damaged. We find no fault with the instructions regarding compensatory damages.

V.

Punitive Damages.

The trial judge also instructed the jury that if it found that the Union had acted with "actual malice or reckless or wanton indifference to the rights of the plaintiff" it might award punitive damages; that such damages were a punishment to the wrongdoer to be related to the gravity of the wrong; and that such damages were unrelated to the award of compensatory damages. We agree that this was a correct statement of the law of punitive damages and that there was sufficient evidence for the jury to find that the Union had acted with malice or wanton indifference. The Union contends, however, that LMRDA does not permit the award of punitive damages under any circumstances. As the jury brought a general verdict, and as the evidence regarding actual damages was slight, we cannot assume that no punitive damages were awarded, and we therefore consider this contention.

We have been able to find nothing in the legislative history of LMRDA which touches directly on this question. Three reported decisions, all in district courts, discuss the point. *Burris v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, W.D.N.C. 1963, 224 F. Supp. 277, 280-81 and *Cole v. Hall*, E.D.N.Y. 1964, 35 F.R.D. 4, 8, affirmed on other grounds, 2 Cir. 1965, 339 F.2d 881 held that the Act did not permit punitive damages,⁹ *Farowitz v. Associated Musicians of Greater New York, Local 802*, S.D.N.Y. 1965, 241 F. Supp. 895, 909, held that it did.¹⁰

⁹ Cf. *McCraw v. United Ass'n of Journeymen & App. of Plumbing*, etc. 216 F. Supp. 655, 662-63.

¹⁰ Of course, the district court in this case permitted punitive damages, and the district court in *Allen v. International Alliance of Theatrical Stage Employees and Moving Picture Operators*, 5 Cir. 1964, 338 F.2d 309, sitting without a jury awarded punitive damages, see *id.* at 314. The question was not raised on appeal in that case.

The jurisdictional provision, Section 412, permits the granting of "such relief . . . as may be appropriate." We do not agree with the court in *Cole v. Hall* that the use of the word "relief" necessarily rules out punitive damages which are strictly speaking not in the nature of relief. We feel it to be appropriate therefore to look to the purposes of LMRDA, and particularly the "Bill of Rights" section to determine whether the granting of punitive damages would serve to best effectuate those purposes.

In the statutory statement of findings and purposes of LMRDA Congress declares that there are instances of unions' "disregard of the rights of individual employees" and that it "is necessary to eliminate or prevent improper practices on the part of labor organizations . . ." 29 U.S.C. § 401. The awarding of punitive damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent.

The state courts, and particularly those of New York have had considerably more experience in curbing abuses in the internal affairs of unions than have had the federal courts in the few years since the passage of LMRDA. It is not inappropriate for the federal courts, in exercising their newly granted jurisdiction to look to this expertise as a guide. "The experience of state courts, both their successes and their failures, can provide helpful guides in devising remedies to make the statutory rights effective." Summers, *The Law of Union Discipline: What the Courts do in Fact*, 70 Yale L. J. 175, 177 (1960). With this in mind, we find persuasive the statement of the New York Supreme Court, Appellate Division, in *Fittipaldi v. Legassie*, 18 A.D. 2d 331, 239 N.Y.S.2d 792, 796:

"Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress the rights of members to a fair and democratic hearing on legitimate disciplinary charges. The very basis for the existence of unionism in our society today is the promise of employment to

those who desire to associate freely in order to obtain it. The right of the working man to the benefits of collective bargaining is too essential and valuable to be hindered, impeded and seriously damaged by irresponsible and dictatorial leaders whose dominance in any given situation does great disservice to the purpose and principles of unionism. When that right of free association is usurped by a concerted, malicious effort to deprive the individual of the safeguards built into the organization, it cannot be condoned . . . Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect."

We hold that the district court did not err in instructing the jury that it might award punitive damages. As in all remedial legislation, LMRDA should be liberally construed to effectuate its purposes.¹¹

For the reasons stated, the judgment of the district court is

AFFIRMED.

¹¹ Cf. *Simmons v. Avisco*, *supra*, 350 F.2d at 1018, 19, where the court upheld an award of \$15,000 in damages to compensate the plaintiff for injury to reputation and resulting mental anguish caused by his unlawful expulsion from the union.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 28012
Summary Calendar

D. C. Docket No. CA 4038-66
GEORGE W. HARDEMAN, *Plaintiff-Appellee*,

v.

THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND
HELPERS, AFL-CIO, *Defendant-Appellant*.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF ALABAMA.**

Before THORNBERRY, MORGAN and CARSWELL,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

December 22, 1969

Issued as Mandate: JAN. 20, 1970

Supreme Court of the United States

No. 1392, October Term, 1969

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO,
Petitioner,

v.

GEORGE W. HARDEMAN

ORDER ALLOWING CERTIORARI. Filed May 25, 1970.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted limited to Questions 1 and 3 presented by the petition which read as follows:

"1. Whether a federal court in a Section 102 proceeding reviewing an expulsion of a member by a union may apply a standard of review whereby the court substitutes its own factual findings and interpretations of the union's constitution and by-laws for those of the union.

"3. Whether the National Labor Relations Act, as amended, preempts an action brought under Section 102 of the Labor-Management Reporting and Disclosure Act wherein a former union member, claiming wrongful expulsion, does not seek restoration of membership rights but claims damages for an alleged loss of employment due to the union's alleged failure to refer him to employers."

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. The court below applied a standard of review inconsistent with the intent of Congress and in conflict with the standard of review applied by other circuit courts of appeals	7
II. An international union may not be held liable for damages in a suit brought under Section 102 alleging wrongful expulsion where its only connection with such expulsion by the local lodge was the performance of its function as an appellate body in reviewing the action taken by the local lodge	14
III. The decision below is in conflict with the preemption principles clearly established in the decisions of this Court, in particular <i>Borden</i> , <i>Perko</i> and <i>Garmon</i>	17
IV. Congress did not intend its authorization in Section 102 for "relief (including injunctions) as may be appropriate" to permit an award for future damages to an expelled member merely because he elects not to seek reinstatement	19
V. Punitive damages are not available in suits against unions under Section 102 for violation of membership rights under Section 101 (a) (5)	21
Conclusion	25
Appendix A: Statutory Provisions Involved	1a

	PAGE
Appendix B: Court of Appeals Opinion and Judgment Below	4a
Appendix C: Opinion of Fifth Circuit in <i>International Brotherhood of Boilermakers, etc. v. Braswell</i> , 388 F. 2d 193	8a

AUTHORITIES CITED

Cases

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, No. 1072, 1969 Term	17
Barr v. Matteo, 360 U.S. 564	16
Boilermakers v. Rafferty, 348 F. 2d 307 (9th Cir.) ..	22
Bradley v. Fischer, 13 Wall 335	16
Burke v. Int'l. Bh'd. of Boilermakers, 302 F. Supp. 1345, aff'd per curiam, 417 F. 2d 1063 (9th Cir.) ..	9, 12
Burris v. International Bh'd. of Teamsters, 224 F. Supp. 277 (W.D. N.C.)	23
Cahn v. International Ladies' Garment Workers' Union, 311 F. 2d 113 (3rd Cir.)	17
Cole v. Hall, 35 F.R.D. 4 (E.D. N.Y.), aff'd. 339 F. 2d 881 (2d Cir.)	23
Farowitz v. Musicians Local 802, 241 F. Supp. 895 (S.D. N.Y.)	23
Fulton Lodge No. 2 of International Association of Machinists v. Nix, 415 F. 2d 212 (5th Cir.)	22
General Committee v. M.K.T.R. Co., 320 U.S. 323 ..	22
International Bh'd. of Boilermakers, etc. v. Braswell, 388 F. 2d 193 (5th Cir.)	7, 9, 10, 15, 22
Int'l. Printing Pressmen Union v. Smith, 189 S.W. 2d 729	15
Keenan v. Metropolitan District Council, 266 F. Supp. 497 (E.D. Pa.)	23

	PAGE
Lewis v. American Federation of State, County and Municipal Employees, 407 F. 2d 1185 (3rd Cir.)	9, 11, 12
Linn v. United Plant Guard Workers, 383 U.S. 53 ..	21
Local 100, United Association of Journeymen and Apprentices v. Borden, 373 U.S. 690	17, 18, 19,
Local 207, International Ass'n. Bridgeworkers, etc. v. Perko, 373 U.S. 701	17
Lummas Company v. NLRB, 339 F. 2d 728 (D.C. Cir.)	18
Madden v. Atkins, 4 N.Y. 2d 283, 115 N.E. 2d 73	15
Magelssen v. Plasterers' Local 518, 240 F. Supp. 259 (W.D. Mo.)	23
McCraw v. United Association, 341 F. 2d 705 (6th Cir.)	22, 23
NLRB v. Allis-Chalmers Mfg Co., 388 U.S. 175	8
NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344	21
People ex rel. Solomon v. Brotherhood of Painters, etc., 218 N.Y. 115, 112 N.E. 752	15
Phillips v. Teamsters Local 560, 209 F. Supp. 768 (D. N.J.)	9
Republic Steel Corp. v. NLRB, 311 U.S. 7	22
Rosen v. Painters Dist. Council 9, 198 F. Supp. 46 (S.D. N.Y.), appeal dismissed, 326 F. 2d 400 (2nd Cir.)	9
San Diego Buildings Trades v. Garmon, 359 U.S. 236	17
Schouten v. Alpine, 215 N.Y. 225, 109 N.E. 244	15
Teamsters Local 20 v. Morton, 377 U.S. 252	21, 22
United Mine Workers v. Patton, 211 F. 2d 742 (4th Cir.)	22
United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F. 2d 277 (3rd Cir.)	22

	PAGE
United Steelworkers v. American Mfg. Co., 363 U.S. 564	11
United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593	11
United Steelworkers v. Warrior & Gulf Navig. Co., 363 U.S. 575	11
Universal Camera Corp. v. NLRB, 340 U.S. 474	13
Vaca v. Sipes, 386 U.S. 171	19, 21
Vapor Blast Shop Workers v. Simon, 305 F. 2d 717 (7th Cir.)	20
Vars v. Int'l. Bh'd. of Boilermakers, 320 F. 2d 576 (2nd Cir.)	9, 12

Statutes

Labor Management Reporting and Disclosure Act (73 Stat. 523, 29 U.S.C. §§ 411, <i>et seq.</i>):	
Section 101(a)(1)	24
Section 101(a)(2)	24
Section 101(a)(3)	24
Section 101(a)(4)	24
Section 101(a)(5) 6, 7, 8, 11, 12, 13, 17, 21, 22, 23, 24	
Section 102 6, 7, 8, 13, 14, 18, 19, 21, 23, 24	
National Labor Relations Act, as amended (49 Stat. 449, 29 U.S.C. §§ 151, <i>et seq.</i>):	
Section 7	18
Section 8(b)(1)(A)	18
Section 8(b)(2)	18
Section 301	22
Section 303	21, 22

Legislative History

Bills:

S. 1555, 86th Cong., 1st Sess., as passed Senate, I Leg. Hist., LMRDA (NLRB) 516 <i>et seq.</i>	24
--	----

	PAGE
Debates:	
Leg. Hist., LMRDA (Department of Labor):	
p. 250	12
pp. 260-261	12
p. 271	12
p. 287	12
p. 290	12
I Leg. Hist. of the LMRDA (NLRB):	
p. 1294	13
p. 1295	13
II Leg. Hist. LMRDA (NLRB):	
p. 1522(1)	24
<i>Union Provisions</i>	
Subordinate Lodge Constitution	
Article XIII, Section 1	5
Subordinate Lodge Bylaws	
Article XII, Section 1	4, 10
<i>Miscellaneous</i>	
Bureau of Labor Statistics, U.S. Department of Labor "Disciplinary Powers and Procedures in Union Constitutions" (Bull No. 1350, 1963)	16
Christensen, <i>Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democ- racy</i> , 43 NYU L. Rev. 227 (1968)	21
<i>Final Report of the National Commission on the Causes and Prevention of Violence</i> (1969)	10, 11
Taft, <i>The Structure and Government of Labor Unions</i> (Harvard University Press, 1954)	15, 16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. —

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO, *Petitioner*,

v.

GEORGE W. HARDEMAN, *Respondent*.

**PETITION FOR A WRIT OF CERTIORARI OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, entered in the above-entitled case on December 22, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, which is reprinted in Appendix B, is not yet officially reported but is unofficially reported at 73 LRRM 2208, 61 LC ¶ 10,553. There was no opinion by the District Court for the Southern District of Alabama.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1969. On February 13, 1970, Mr. Justice Black entered an Order staying the execution and enforcement of

the judgment of the United States District Court for the Southern District of Alabama pending the timely filing and disposition of a petition for certiorari. On March 12, 1970, the time for filing a petition for certiorari was extended to and including April 6, 1970. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal court in a Section 102 proceeding reviewing an expulsion of a member by a union may apply a standard of review whereby the court substitutes its own factual findings and interpretations of the union's constitution and by-laws for those of the union.

2. Whether an international union may be held liable in damages in a suit brought under Section 102 merely for denying the appeal of a member expelled by a Local Lodge.

3. Whether the National Labor Relations Act, as amended, preempts an action brought under Section 102 of the Labor-Management Reporting and Disclosure Act wherein a former union member, claiming wrongful expulsion, does not seek restoration of membership rights but claims damages for an alleged loss of employment due to the union's alleged failure to refer him to employers.

4. Whether in a Section 102 suit an expelled member may elect not to seek reinstatement and thereby obtain an award of future damages.

5. Whether an award of punitive damages may be had in a proceeding under Section 102 and, if so, can malice be attributed to an international union merely for denying the appeal of a member expelled by a Local Lodge.

STATUTES INVOLVED

The pertinent portions of the Labor-Management Reporting and Disclosure Act, 73 Stat. 523, 29 U.S.C. §§ 411

et seq.—Sections 101(a)(5), 102, 29 U.S.C. §§ 411(a)(5), 412—and of the National Labor Relations Act, as amended, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.*—Sections 7, 8(b)(1) (A), 8(b)(2) and 8(a)(3), 29 U.S.C. §§ 157, 158(b)(1) (A), 158(b)(2), 158(a)(3)—are set out in Appendix A, p. 1a, *infra*.

STATEMENT OF THE CASE

On October 5, 1960, Herman H. Wise, business manager of Local Lodge 112 of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter referred to as Local Lodge), left his office in the local union hall in order to go to a job site in the course of the performance of his official duties. (PX-1, p. 62)¹ George W. Hardeman, a member of the local union, who had been engaged in a dispute with Wise concerning his claim that the union was improperly failing to refer him to jobs, was in the lobby of the union hall (PX-1, pp. 29, 51). When Wise reached the lobby, Hardeman handed him a telegram concerning a referral to a job, and when Wise attempted to read it, Hardeman assaulted Wise, hitting him in the face and staggering him with other blows (PX-1, pp. 29, 63-64). W. C. Bell who had left the union office with Wise attempted to stop Hardeman, and E. T. Braswell who was present told Bell not to interfere. (PX-1, pp. 29, 71, 80). Wise returned to his office and called the police² (PX-1, pp. 32, 84). On the following day after a hearing in a criminal

¹ The exhibits in the trial before the District Court are not contained in the record certified by the Court of Appeals but rather as one part of a two-part record separately certified by the Clerk of the District Court. Plaintiff's and defendant's exhibits are cited herein as "PX" and "DX," respectively.

² Later in the day the police arrived at a time when Hardeman was not present. (PX-1, p. 32.) At that time when Wise stated to the police that Braswell, who was standing there, had been present during the assault by Hardeman, Braswell hit Wise and broke his nose. (PX-1, pp. 32, 67, 85.)

court, Hardeman was fined \$25 and costs of court for his conduct. (PX-1, pp. 34-35).

On October 11, 1960, Wise filed charges with the Local Lodge alleging that Hardeman's conduct constituted a violation of a provision in the Subordinate Lodge Bylaws³ providing for punishment for any member who through the use of force or violence or the threat of the use of force or violence restrains, prevents, or attempts to restrain or prevent any official of the local lodge from properly discharging the duties of his office. The charges also alleged a violation of the Subordinate Lodge Constitution providing for expulsion upon conviction of any member who endeavors to create dissension among the members or works against the interest or harmony of any Subordinate Lodge.⁴

³ That provision was Article XII, Section 1 providing:

"In addition to the offenses and penalties set out in the applicable provisions of the International and Subordinate Lodge Constitution, the following offenses and penalties shall be observed in this Subordinate Lodge, and any member who violates same shall, if found guilty after proper hearing as provided herein, be punished as warranted by the offense.

"(1) It shall be a violation of these By-Laws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office."

⁴ The constitutional provision is Article XIII, Section 1 of the Subordinate Lodge Constitution which provides:

"Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Brotherhood or of any District or Subordinate Lodge; who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its Subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood."

(PX-1, pp. 2-3, 26). Copies of the charges were served upon Hardeman on October 11, 1960. A full hearing was held before a local lodge trial committee on November 12, 1960 (PX-1). At the hearing Hardeman was represented by Robert Dobson, a union member who served as his representative (PX-1, p. 3). The hearing lasted from 10:00 a.m. to 7:15 p.m. Eight witnesses testified at the hearing, and a transcript of the hearing was made which consisted of 172 pages (PX-1).

The trial committee determined that Hardeman was "guilty as charged" (PX-2). The trial committee's determination was reported to the local lodge at a regular union membership meeting on December 3, 1960 (PX-2). The trial committee's decision was sustained by a vote of the membership which voted by secret ballot to expel Hardeman from the organization "indefinitely." The vote in favor of expulsion was 59 for, 36 against (PX-2).

Hardeman appealed the membership's action to the International President who denied the appeal (PX-5). Hardeman then appealed to the International Executive Council (PX-3). After a hearing before a panel of the Executive Council (PX-4), the Executive Council denied the appeal on April 19, 1961 (PX-16).

Subsequent to his expulsion, Hardeman signed the out-of-work list maintained at the union office and was referred to a job at which he worked for five days. (R. 132, 134).⁵ The union records show that he signed the out-of-work list twice and thereafter did not sign the out-of-work list (DX-3, R. 322, 329, 336). The job referral rules for employment required unemployed members and non-member applicants to report and register each month as available for employment and stated that their name would be removed from

⁵ "R" herein refers to the record certified by the Court of Appeals.

the out-of-work list in the absence of such report and registration (DX-3).

On April 4, 1966,⁶ more than five years after Hardeman was expelled by the local lodge, Hardeman filed a complaint in the District Court purporting to base jurisdiction on Section 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 412 (R. Docket entries). The complaint, filed against the International Union only, prayed solely for damages, consequential and punitive, and did not seek reinstatement to membership (R. 1-9). The case was tried on January 16 and 17, 1969 (R. 28). At the conclusion of the trial, the District Court found as a matter of law that the expulsion was unlawful under Section 101(a)(5) of the Act stating that there was no evidence before the Trial Committee to support the charges (R. 432-433). The trial judge then charged the jury that it could find both compensatory and punitive damages (R. 433-35). The jury returned a verdict against the International Union for \$152,150.00 (R. 440).

The only evidence adduced at the trial in the District Court relating to damages involved alleged loss of wages from the alleged failure of Hardeman to obtain and of the local to refer him to employment as a boilermaker during the post-expulsion period (R. 130-134, 162-164, 302-307, 321-337, 360-364, 369, 404). Hardeman testified only that, subsequent to the loss of his union card, he was "unable to work in the boilermaker's trade beyond one job lasting five days" (R. 130, 134). He also testified, however, that, during the year prior to his expulsion, he only worked five days "out of the local" (R. 145). Richard Kittrell, a witness called by Hardeman, testified that men work regularly out of the local without a union card (R. 405).

⁶ On September 12, 1963, Braswell had filed a complaint in the District Court under Section 102, and on February 16, 1966, was awarded \$12,500 in damages. (See No. 1314, October Term, 1967.)

Mortality tables were introduced at the trial, and Hardeman testified that he earned from \$5500 to \$6000 per year prior to his expulsion from the union (R. 143, 214-15). Counsel for Hardeman argued to the jury that Hardeman's consequential damages were at least \$130,231.52, which represented Hardeman's past and future loss of wages from the date of his expulsion in 1960 until his projected retirement in 1983 at age 65 (R. 410-412). A plea for punitive damages was also made (R. 413-414).

The Court of Appeals affirmed. The Court's *per curiam* opinion adopted the opinion in *International Bh'd. of Boilermakers, etc. v. Braswell*, 388 F. 2d 193 (5th Cir.),⁷ as the basis for its holding describing that case as a case "arising out of the exact factual situation as that involved in the present case."

REASONS FOR GRANTING THE WRIT

- I. The court below applied a standard of review inconsistent with the intent of Congress and in conflict with the standard of review applied by other circuit courts of appeals.

This case is one in which the standard of review applied by the Court does conflict with the standard of review adopted by other Circuit Courts of Appeals. This case is one in which the standard of review applied by the Court violates the intent of Congress in enacting Section 101(a) (5) and Section 102 of the Act. More important, however, this case presents the fundamental issue of the relationship of the courts to the union disciplinary process. It presents not just a technical question of the quantum of evidence required. Bluntly stated, it presents the issue of whether the courts are permitted to exercise a kind of review of workingmen's internal proceedings and determinations

⁷ A copy of the Court's Opinion in *Braswell* is reprinted as Appendix C.

which imposes upon them a standard of performance they may not fairly be expected to meet. Congress has made it clear that union self-government is important to the country and to the country's labor relations. Judicial review, which demands a meticulous performance by union tribunals in carrying out disciplinary proceedings that will match the best performance of the federal trial judges, will make impossible the internal self-regulation which Congress was careful to preserve in enacting the Labor-Management Reporting and Disclosure Act and will, thus, destroy workingmen's attempts to provide their own forms of justice.

The destruction of institutions established by workmen's groups which are essential for their self-government also has adverse implications for the stability of collective bargaining relations.

Section (101)(a)(5) is procedural in nature. In *NLRB v. Allis-Chalmers Manufacturing Company*, 388 U.S. 175, this Court pointed out at p. 194 that:

"... In 1959 Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subject to discipline. Even then, some Senators emphasized that 'in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents.' S. Rep. No. 187, 86th Cong., 1st Sess., 7. ... Indeed that Congress expressly recognized that a union member may be 'fined, suspended, expelled, or otherwise disciplined, and enacted only procedural requirements to be observed.'"

Most of the cases which have arisen in the federal courts involving the review of union disciplinary proceedings in suits brought under Section 102 of the Act have held that judicial inquiry into alleged violations of Section 101(a)(5)

is governed by a standard of review which confines the reviewing court to the narrow area of determining whether there is *some evidence* to support the charges made. *Lewis v. American Federation of State, County and Municipal Employees*, 407 F. 2d 1185 (3rd Cir.); *Vars v. Int'l. Bh'd. of Boilermakers*, 320 F. 2d 576 (2nd Cir.); *Burke v. Int'l. Bh'd. of Boilermakers*, 302 F. Supp. 1345, aff'd. *per curiam*, 417 F. 2d 1063 (9th Cir.); *Rosen v. Painters Dist. Council 9*, 198 F. Supp. 46 (S.D. N.Y.), appeal dismissed, 326 F. 2d 400 (2nd Cir.); *Phillips v. Teamsters Local 560*, 209 F. Supp. 768 (D. N.J.)

The court below applied a wholly different standard of review. The court's opinion incorporated by reference as the basis for its holding *International Brotherhood of Boilermakers v. Braswell*, 388 F. 2d 193 (5th Cir.), cert den. 391 U.S. 935.⁸ That case adopted the "some evidence" rule. In the instant case the court, in fact, did not follow that rule, and substituted its own findings for those of the union membership as well as substituted its own interpretation of the union's Constitution and By-laws for the union's interpretation.

We can only ascertain the standard applied in *Hardeman* by analysis of what the court below in fact did. At the outset, the court below fell into a threshold error of mistaking the factual situation in *Hardeman* as identical with the factual situation in *Braswell*. In *Hardeman* the short of the matter is that *Hardeman* struck the Local Lodge Business Agent Wise because of a dispute over Wise's alleged failure to refer *Hardeman* to work on particular construction jobs to which *Hardeman* believed he had a right of referral. Job referrals were clearly a function within the scope of the business agent's duties. *Braswell*, on the other hand, was not involved in any dispute over job referral and hit the

⁸ Questions 2 through 4 were not presented to this Court in the petition for certiorari in *Braswell*. Question 1 was presented in a different aspect from that presented here.

same Business Agent Wise because, subsequent to Hardeman's assault on Wise, the police were called, and Wise, in Braswell's presence, pointed to Braswell as having been present during the affair initiated by Hardeman. Hardeman was not present at the time of this occurrence. Thus, this case did not grow out of the "exact factual situation" as did *Braswell*. Braswell may have struck Wise in a fit of personal anger at being pointed out to the police by Wise.⁹ Hardeman's attack upon the business agent had an entirely different motivation, namely, to force Wise to give him a job referral. Hardeman played the primary role in the incident which he initiated, and his conduct is not to be equated with that of Braswell. Here, the facts narrated in the Statement of Facts, *supra*, are based upon probative evidence contained in the transcript of the hearing before the union trial committee.¹⁰ In short, probative evidence before the union showed that Hardeman beat up the business agent because he was not satisfied with the job referral system as operated by the union. Since there was at the very least adequate probative evidence to support the findings of the trial committee and the union membership, it is clear that the Court of Appeals weighed the evidence before the trial committee and reached a contrary result.

Clearly, a physical assault upon a business agent because of a dispute over job referrals constitutes a violent restraint or an attempt to restrain a union officer in the performance of his duties and thereby violates Article XII, Section 1 of the Local Lodge's By-Laws. Moreover, violence provokes dissension¹¹ and works against the interests

⁹ Such was the Fifth Circuit's independent finding of fact in *Braswell*.

¹⁰ The references to those portions of that transcript which contain the principal evidence which supports the union's findings are paginated in the Statement of Facts.

¹¹ The National Commission on the Causes and Prevention of Violence has pointed out that both group and individual violence has had a divisive effect, jeopardizing precious institutions such as

and harmony of the Subordinate Lodge. Thus, all five members who were present at the altercation immediately became involved on opposite sides in Hardeman's dispute with Wise. It is reasonable to infer that the assault on the principal officer of the local union in connection with the performance of his official duties would tend to polarize sentiment and attitudes within the local. The union's determination that there was "dissension" in its view of the term created by Hardeman's attack is supported by the facts.

The result reached in this case by the court below in substituting its own judgment for that of the union is at war with the intent of Congress as to the role of the federal courts in reviewing union disciplinary proceedings under Section 101(a)(5). Congress did not intend that the courts engage in a full scale review of the internal law of the union or the facts. *Lewis v. American Federation of State, County and Municipal Employees*, *supra*.

The reasoning of this Court in the *Steelworkers Trilogy*¹² applies here. Judicial restraint is essential, for courts are not equipped with experience or expertise in the internal

schools and universities "poisoning the spirit of trust and cooperation that is essential to their proper functioning" and "corroding the central political processes of our democratic society—substituting force and fear for argument and accommodation." *Final Report of the National Commission on the Causes and Prevention of Violence*, page xv (1969). Similarly, the use of violence in the form of a physical attack upon a union official has divisive effects among union memberships and encourages the use of force to effectuate changes in the administration of the tasks of a labor union in lieu of resort to the established peaceful internal processes of filing and processing charges of maladministration on the part of the union or filing claims with the contractually established joint referral committees whose function is to police the referral system.

¹² *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574; *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593. See *Lewis*, *supra*, at 1193.

operation of unions. The unions, too, have their own jargon, and their own understanding of the concepts that their internal "laws" comprehend. As the Second Circuit stated in *Vars, supra*, and the Third Circuit in *Lewis, supra*, the courts are not to weigh the credibility of witnesses or to evaluate the quantum of evidence adduced at union hearings. Federal court review must obviously be limited to such inspection of the union proceedings as will enable the court to determine that procedural fairplay was had. For the reasons stated above, the standard applied by the court below is in conflict with the views of the Second and Third Circuits and by the Ninth Circuit in its affirmance of the District Court in *Burke v. Boilermakers, supra*.

The mood of Congress was expressed in this legislation. Congress clearly intended that Section 101(a)(5) be procedural only. The "some evidence" rule, if it can be justified at all, can only be justified as a way of assuring procedural due process. For if there were no evidence at all, there would not be a full and fair hearing. Congress made it clear, however, that it did not intend to substitute the courts for the unions in determining when the unions should administer discipline in a particular case. Thus, even the original Bill of Rights as embodied in the McClellan Amendment in the Senate was limited to guaranteeing specifically enumerated procedures surrounding the disciplinary hearings and did not allow courts to review *de novo* the union proceedings. That amendment provided for final review on a written transcript of the hearing by an impartial person, but the McClellan Amendment itself was attacked on the ground that the procedural requirements were unduly burdensome and needlessly onerous in the context of union affairs. *Leg. Hist. of the LMRDA* (Dept. of Labor) at 250, 290, 260-261, 271, 287. The Kuchel substitute, a weaker provision on union discipline, which is now Section 101(a)(5) of the Act, was approved to replace the McClellan Amendment.

The changes made by the Kuchel substitute in 101(a)(5), including elimination of the requirement for a written transcript, have significance with reference to the standard of review intended by Congress. Senator McClellan himself emphasized that the standards provided by the Bill of Rights as found in the Kuchel substitute were minimum standards. *I Leg. Hist. of the LMRDA (NLRB)* at 1294. He stated that "the real issue now in this proposed labor reform legislation" was corruption, racketeering and exploitation by dishonest and criminal union officers tending to subvert the right of union membership "to manage and control their internal union affairs by recognized and respected democratic process" *I Leg. Hist. of LMRDA (NLRB)* at 1295.

As legislation, the mood of Congress must be respected. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487. In *Universal Camera* this Court made it clear that the court has an important function in insuring that the intent of Congress with regard to the scope of review is honored. There comes a time when the court must turn its attention to the exercise of the role of the judiciary in regard to the reviewing function entrusted to the courts by Congress. This Court felt that time had come with regard to the examination of the role of the judiciary under Taft-Hartley, approximately four years after the statute was enacted. The Labor-Management Reporting and Disclosure Act has now been law for more than ten years. Where, as here, the federal courts are showing a tendency to supplant the unions in the administration of discipline of union members and to pave the way for excessive damages awarded by juries, there is an invitation to litigation designed not to restore membership rights, but to seek windfalls. Such results show that the time has come for this Court to examine the reviewing function of the federal judiciary under Section 102.

II. An international union may not be held liable for damages in a suit brought under section 102 alleging wrongful expulsion where its only connection with such expulsion by the local lodge was the performance of its function as an appellate body in reviewing the action taken by the local lodge.

The Fifth Circuit's opinion in this case deals with important statutory and policy considerations growing out of the application of Section 102/^{to}an International's performance of its appellate function. Particularly, since this Court has not had occasion to address itself to that subject since the enactment of the Labor-Management Reporting and Disclosure Act, there are compelling reasons why the Court should address itself to this question.

This case presents the question whether an international union may be held liable in damages in a suit under Section 102 of Landrum-Griffin where its sole connection with the expulsion of respondent Hardeman by the Local Lodge was its action as an appellate body reviewing the Local Lodge's proceedings.¹³ In that regard, the decision below is in conflict with several decisions of the highest court of the State of New York and presents a question of major importance in the administration of the Act.

¹³ Goodlin, an International officer, was present at the hearing before the Trial Committee to offer technical assistance (PX-1, p. 6). There was no charge that this was improper. Indeed, immediately prior to the conclusion of the plaintiff's case in the trial court, the plaintiff was permitted to amend paragraph 4 of the complaint in all counts to conform the complaint to the proof by striking out the allegation that the Trial Board was selected by the defendant International Union and to add an allegation that the plaintiff Hardeman's final appeal was denied by the defendant on or about April 1961 (R. 215-217). That is the date upon which the International Executive Board denied Hardeman's appeal (PX-16). Thus, the only specific allegation of wrongdoing on the part of the International is the Executive Board's denial of plaintiff's appeal.

The New York Court of Appeals has long held that absent a showing of fraud or bad faith, an international union may not be held liable for damages in a suit brought by an expelled member merely because it acted as an appellate tribunal. This is true even if the decision of the international on appeal is erroneous. *Schouten v. Alpine*, 215 N.Y. 225, 109 N.E. 244; *People ex rel. Solomon v. Brotherhood of Painters, etc.*, 218 N.Y. 115, 112, N.E. 752. See also *Madden v. Atkins*, 4 N.Y. 2d 283, 115 N.E. 2d 73.¹⁴ In *Solomon*, the Court stated as follows with respect to the liability of the International:

"... It acted as an appellate body to review the order of expulsion which was entered against the relator by the district council. Its only action in the case was the exercise of its function to hear the appeal and review the action of the local body... [It] could not be held liable in damages as to the relator because it affirmed the order of expulsion in the absence of fraud or bad faith." 112 N.E. at 754.

As indicated in the decision of the Court of Appeals for the Fifth Circuit in *Braswell*, the decisions of the New York courts are entitled to special weight because of their expertise in the application of the common law to internal union affairs.

International union appellate review procedures serve as a protection to the individual member. Professor Taft's study of union constitutions and appeal cases led him to the conclusion that:

"It is obvious that the appellate machinery offers real protection in most unions, and that central organizations do not freely allow unreasonable penalties or unwarranted convictions." Philip Taft, *The Structure and Government of Labor Unions* (Harvard University Press, 1954), at p. 180.

¹⁴ *Contra, Int'l Printing Pressmen Union v. Smith*, 189 S.W. 2d 729.

As an illustration of this point, Professor Taft cited the experience in the Carpenters Union where, during an eleven month period in 1952, there were 39 appeals from local union decisions to the International President involving fines. Of these cases 11 or 28.2% were reversed and the verdict in 7 or 15.4% of the cases was upheld but the penalty reduced (*Id.*, p. 143). There is no indication from the language of the statute (see Sections 101(a)(5) and 102) that the union appellate procedures were the evil at which the law was aimed.

The present scope and availability of appellate review procedures in the internal proceedings of labor unions are reflected by a 1963 Bureau of Labor Statistics study of 156 national and international constitutions which showed that 153 provided for appellate review of at least some trial decisions, and 142 for review of all local trial decisions. Bureau of Labor Statistics, U.S. Department of Labor "Disciplinary Powers and Procedures in Union Constitutions" (Bull. No. 1350, 1963), pp. 107-110. Another study of internal union structure states, "it is not unusual for an international union to handle 100 appeals a year, and the average appears to be above that number. Each year there is likely to be several thousand appeals by union members involving disciplinary issues . . ." Taft, *supra*, at p. 124.

It is respectfully submitted that the Congress did not intend to impose heavy pecuniary liability on international unions because their opinions on appeals from local union decisions are not sustained by the Federal courts. The relationship between a local union and an international union stems normally, as in the instant case, from a federated system. The International's role as an appellate body is analogous to that of an appellate court in reviewing the decisions of the trial court. An erroneous decision of a federal appellate court does not make either the court or the Federal Government liable for that error. *Bradley v. Fischer*, 13 Wall 335; *Barr v. Matteo*, 360 U.S. 564, 569. An erroneous decision of an arbitrator does not make him liable

in a civil suit. *Cahn v. International Ladies' Garment Workers' Union*, 311 F. 2d 113 (3rd Cir.). To hold an international union liable solely for exercising its traditional appellate functions is shocking. Moreover, such a result is incompatible with the Congressional purpose of preserving the principles and procedures of union self-regulation to the maximum extent possible. If international unions are to be subjected to large damage awards where in good faith the appellate tribunal upholds what a court later determines to be an erroneous action of a local union, international unions are likely to cease furnishing appellate tribunals and, thus, to weaken the processes of union self-government.

III. The decision below is in conflict with the preemption principles clearly established in the decisions of this court, in particular *Borden*, *Perko* and *Garmon*.

This case raises the important question whether a suit against a union brought under Section 102 which does not seek restoration of membership but which seeks not only past damages but also future damages for an alleged loss of employment alleged to be attributable to a union's failure to refer the plaintiff to employers through the union's hiring hall is preempted by the National Labor Relations Act. *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690; *Local 207, International Ass'n. Bridgeworkers, etc. v. Perko*, 373 U.S. 701; *San Diego Buildings Trades v. Garmon*, 359 U.S. 236. This case preemption-wise is similar to *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, No. 1072 in which, on March 30, 1970, this Court granted certiorari.

The so-called "Bill of Rights", of which Section 101(a) (5) is a part, refers to rights of membership. The Labor-Management Reporting and Disclosure Act deals with the

relationship between a member and his union, not with a member's employment relations. The conduct alleged to have been engaged in by the union in this case, which was his real concern, was a refusal by the local union to refer Hardeman, the respondent, to jobs. Hardeman claimed that the union's refusal to refer resulted in his inability to obtain employment. It was that conduct for which damages were sought. Such conduct is arguably subject to the prohibitions of Sections 8(b)(2) and 8(b)(A) of the National Labor Relations Act or is arguably protected by Section 7 of that Act.¹⁵ This is the type of conduct which was the subject matter of the lawsuit in *Local 100 v. Borden, supra*, where this Court held that such conduct was arguably prohibited or protected by the National Labor Relations Act.

Suits brought under Section 102 to enforce the Bill of Rights are suits to enforce a Federal statutory right. To the extent that a suit brought under Section 102 deals with membership rights, such a suit is not preempted by the National Labor Relations Act. Thus, in a suit which seeks reinstatement to membership for a wrongful expulsion or suspension, there is no preemption of the National Labor Relations Act. In such a suit collateral relief in the form of consequential damages up to the date of restoration of membership or an offer to restore membership may be awarded. Reinstatement to membership, the statutory right comprehended by Congress, is not the aim of this suit. This Congressional objective is not pursued and the subject matter of the suit simply does not come within the ambit of the Bill of Rights. Hence, where, as here, the suit involved focuses "principally, if not entirely, on the union's actions with respect to Borden's [Hardeman's] efforts to obtain

¹⁵ Indeed, if the facts were as alleged by respondent, which we do not concede, the conduct clearly is prohibited by Sections 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act and subject to the jurisdiction of the National Labor Relations Board. *Lummus Company v. NLRB*, 339 F. 2d 728 (D.C. Cir.).

employment the National Labor Relations Act pre-empts." ¹⁶ Here, as in *Borden*, "no specific equitable relief is sought directed to Borden's [Hardeman's] status in the union" and, thus, there is no Federal remedy "to fill out" by permitting the award of consequential damages." *Borden*, *supra*, at p. 697. The "crux" of the action here concerns Hardeman's employment relations and involves conduct arguably subject to the National Labor Relations Board's jurisdiction. *Borden* involved state court litigation. The preemption doctrine applies to Federal courts as well as state courts. *Vaca v. Sipes*, 386 U.S. 171, 179. The result reached by the Fifth Circuit, therefore, is in conflict with the decisions of this Court and, in particular, with this Court's decision in *Borden*.

IV. Congress did not intend its authorization in section 102 for "relief (including injunctions) as may be appropriate" to permit an award for future damages to an expelled member merely because he elects not to seek reinstatement.

The award of future damages in the circumstances of this case raises an important issue of first impression in the construction and application of the Labor-Management Reporting and Disclosure Act significant in the administration of that statute.

In this case Hardeman filed his suit five years after his expulsion and has never sought reinstatement in the Union.¹⁷ Nevertheless, he sought compensatory damages allegedly resulting from the loss of his union membership for a period of 23 years, computed from the date of his expulsion in 1960 until 1983, when he would reach the retirement

¹⁶ 373 U.S. at 697.

¹⁷ The trial court precluded the introduction of evidence showing that Bullock, one of the participants in the incident in which Hardeman was involved and who was likewise expelled, was reinstated to membership (R. 39-40).

age of 65 (R. 410-412). The District Court did not correct this patently erroneous standard. Rather, the District Court directed the jury to award compensatory damages to cover wages lost "in the future" (R. 433), permitting a compensatory award uncertain in amount but of approximately \$130,000.¹⁸ The petitioner objected to this instruction and raised the general issue of damages before the Court of Appeals. That Court did not disturb the damage award of approximately \$152,000, including punitive damages, and did not permit petitioner the opportunity for oral argument.

We call to the Court's attention that the sum of \$152,000 with simple interest at only 7 per cent per year would yield Hardeman an annual income of \$10,640 for life, substantially more than he had earned prior to his expulsion. And, he would still retain his capital amount of \$152,000. Even if legal costs reduce his recovery by one-third, his annual income on the basis of the above calculation would be in the neighborhood of \$7,000 with full retention of the capital amount. He would receive such a windfall simply because he chose not to seek to regain his union membership which he claimed was necessary to return to work as a boilermaker.

Thus, there is presented the important question as to whether a litigant may convert a claim for compensatory damages by loss of wages into a claim for a lifetime annuity by electing not to seek reinstatement. The decision of the court below in allowing such a remarkable conversion is in conflict with elementary principles of mitigation of damages universally applied by the courts and conflicts in principle with the decision of the Seventh Circuit in a case arising under the National Labor Relations Act where the employee did not desire reinstatement. *Vapor Blast Shop Workers v. Simon*, 305 F. 2d 717, n. 4 (7th Cir). See also,

¹⁸ Counsel for Hardeman in his summation to the jury used a figure of \$130,231.52 (R. 412).

NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344, 346.

This Court has demonstrated its concern in a variety of contexts that damage awards against unions be drawn with great caution and precision. *Linn v. United Plant Guard Workers*, 383 U.S. 53 (common law actions for libel); *Vaca v. Sipes*, 386 U.S. 171 (fair representation); *Teamsters Local 20 v. Morton*, 377 U.S. 252 (suits under Section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187).

Congress in enacting Title I did not intend to place in jeopardy the financial status of the unions as institutions by subjecting them to runaway damage awards in the nature of annuities where a member elects not to seek reinstatement. This Court, recognizing "the propensity of juries to award excessive damages" (*Linn v. United Plant Guard Workers*, *supra*, 383 U.S. at 64, 65) has recognized the importance of not allowing damage remedies to defeat the "needs of national labor policy," 383 U.S. 67. In enacting the Bill of Rights, Congress intended "to create limits on the exercise of union authority without vitiating a labor organization's essential strength."¹⁹ The decisions below clearly overstep these limits.

V. Punitive damages are not available in suits against unions under section 102 for violation of membership rights under section 101(a)(5).

The question as to whether punitive damages are available in an action under Section 102 is an important statutory issue as to which lower federal courts are in conflict.

The general rule is that in federal statutory causes of action punitive damages are not available unless expressly provided for by Congress. Congress has demonstrated that

¹⁹ Christensen, *Union Discipline under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 NYU L. Rev. 227, 278 (1968).

it knows how to provide for a punitive damage remedy and has clearly demonstrated its intention when it chooses to permit such a remedy. *United Mine Workers v. Patton*, 211 F. 2d 742, 749 (4th Cir.) cert. denied 348 U.S. 824, 17 U.S.C., Section 1 (copyright); 35 U.S.C., Section 67 (patent); 15 U.S.C., Section 15 (anti-trust). This rule has special relevance with regard to labor legislation. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-13; see *General Committee v. M.K.T.R.Co.*, 320 U.S. 323, 332-333. This Court in *Teams v. Morton*, 377 U.S. 252, held that punitive damages were not available under Section 303 of Taft-Hartley. With regard to the issue of punitive damages under Section 301, the Court of Appeals for the 3rd Circuit, dividing 5-3, held that punitive damages may not be awarded under that Section. *United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F. 2d 277 (3rd Cir.).

While courts of appeals other than the Fifth Circuit have not ruled expressly on punitive damages in suits under Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act, to award damages thereunder presents a conflict in principle with regard to the application of punitive damages under the national labor policy. Compare *United Shoe Workers v. Brooks Shoe Mfg. Co.*, *supra*, with *International Brotherhood of Boilermakers v. Braswell*, *supra*. Curiously, the Fifth Circuit itself is confused about punitive damages under Section 101(a)(5). Thus, in *Fulton Lodge No. 2 of International Association of Machinists v. Nix*, 415 F. 2d 212, at n. 23 (5th Cir., 1969), a panel of that court held that punitive damages do not lie, citing *Braswell*!

Two Courts of Appeals have held other remedies unavailable in a fashion which would make the unavailability of punitive damages as a remedy an *a fortiori* proposition. *Boilermakers v. Rafferty*, 348 F. 2d 307, 315 (9th Cir.) holding damages for emotional distress impermissible under Section 102; *McCraw v. United Association*, 341 F. 2d 705, 710 (6th Cir.), affirming 216 F. Supp. 655, 662, 664 (E.D.

Tenn.) holding the allowance of attorneys' fees not authorized under Section 102.²⁰

Several other courts have said that punitive damages are not recoverable. *Magelssen v. Plasterers' Local 518*, 240 F. Supp. 259 (W.D. Mo.) (alternative holding); *Cole v. Hall*, 35 F.R.D. 4 (E.D. N.Y.), *aff'd*, 339 F. 2d 881 (2d Cir.); *Burris v. International Bhd. of Teamsters*, 224 F. Supp. 277 (W.D. N.C.). Other courts have awarded punitive damages on a showing of malice and willfulness. *Farowitz v. Musicians Local 802*, 241 F. Supp. 895 (S.D. N.Y.). The Labor-Management Reporting and Disclosure Act was enacted by Congress as part of a closely integrated statutory scheme for labor-management regulation; and no construction of any of the statutes which form that policy can properly be made without considering the entire statutory structure. The provisions of the National Labor Relations Act, the Railway Labor Act and the Labor-Management Relations Act, 1947, as amended, do not comprehend awards of punitive damages. It is, therefore, unlikely that Congress in enacting Section 101(a)(5) intended to provide a punitive damage remedy.

The legislative history is relatively sparse on the issue of remedies under Section 102. Such history as there is confirms the conclusion that Congress intended to limit damages against unions to those which are compensatory in nature. For example, the Kennedy-Ervin Bill, as it passed the Senate subsequent to the adoption of the Kuchel substi-

²⁰ *McCraw* held that in actions under Sections 101(a) and 102 of the Act damages are to be limited "to those which directly and proximately resulted from the alleged violation of the Act. . . ." *Ibid*. See also *Keenan v. Metropolitan District Council*, 266 F. Supp. 497 (E.D. Pa.) holding damages for mental anguish and loss of reputation not allowable.

tute, contained a specific criminal provision making it unlawful for a "labor organization, its officers, agents, representatives, or employees, to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provision of this Act" (Section 607 of S.1555, I Legislative History of LMRDA at 575-576). The Landrum-Griffin bill deleted the criminal penalty and substituted civil enforcement. Congressman Griffin stated that "... the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act and, accordingly, we do not believe that criminal sanctions are warranted," II Legislative History of LMRDA 1522 (1). The analogy to Taft-Hartley unfair labor practices reinforces the conclusion that the civil relief sections of Landrum-Griffin were not intended to encompass punitive damages.

In any event, the record in this case provides no basis for a finding of malice and certainly not as to the International Union's exercise of its appellate function. Actually, all that was claimed by the plaintiff as to the actions of the International Union was that "... his final appeals were denied by Defendant on or about April 1961 ..." (R. 216).

Finally, it should be noted that Section 102 provides for civil actions in connection with the infringement of rights in Sections 101(a)(1) "Equal Rights," 101(a)(2) "Freedom of Speech and Assembly," 101(a)(3) "Dues, Initiation Fees, and Assessments," 101(a)(4) "Protection of the Right Agreements," in addition to Section 101(a)(5) "Safeguards against Improper Disciplinary Action" which is involved in this case. The variety of rights which come within the scope of Section 102 explains the general language in that section authorizing civil actions "in a District Court of the United States for such relief (including injunctions) as may be appropriate." It is respectfully submitted that, in using the quoted language, Congress did not intend pecuniary recov-

eries from union treasuries for violations of Section 101(a) (5) which exceed the traditional remedies provided by other Federal statutory labor policy (such as in the National Labor Relations Act) against employers for unlawful discharges of employees, i.e. reinstatement and backpay. It is also most doubtful that Congress intended to provide for astronomical pecuniary recoveries (including lifetime annuities and punitive damages), the hazards of which would tend to "chill" the proper utilization of union disciplinary procedures—at times, the only effective means of discharging union responsibilities to deal with illegal wildcat strikes by groups of employees.

VI. Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

JOHN J. BLAKE,
570 New Brotherhood Building
Kansas City, Kansas 66101

LOUIS SHERMAN,
ELIHU I. LEIFER,
1200 15th Street, N.W.
Washington, D. C. 20005

BERNARD CUSHMAN,
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorneys for Petitioner

Of Counsel:

SHERMAN, DUNN & COHEN
Washington, D. C.

APPENDIX A**STATUTORY PROVISIONS INVOLVED****Labor-Management Reporting and Disclosure Act: Sections 101 (a) (5) and 102**

The pertinent provisions of the Labor-Management Reporting and Disclosure Act, 73 Stat. 523, 29 U.S.C. §§ 411 *et seq.*, are as follows:

Section 101(a)(5), 29 U.S.C. § 411(a)(5), provides:

"Safeguards Against Improper Disciplinary Action
—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

Section 102, 29 U.S.C. § 412, provides:

"Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

National Labor Relations Act: Sections 7, 8(b)(1)(A), 8(b)(2) and 8(a)(3)

The pertinent provisions of the National Labor Relations Act, as amended, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.*, are as follows:

Section 7, 29 U.S.C. § 157, provides:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).”

Section 8(b)(1)(A), 29 U.S.C. § 158(1)(A) makes it an unfair labor practice for a labor organization or its agents:

“to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein* * *.”

Section 8(b)(2), 29 U.S.C. § 158(2) makes it an unfair labor practice for a labor organization or its agents:

“to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.”

Section 8(a)(3), 29 U.S.C. § 158(a)(3), makes it an unfair labor practice for an employer:

“by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a

labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * *: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

APPENDIX B

**IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT**

No. 28012

Summary Calendar

GEORGE W. HARDEMAN, *Plaintiff-Appellee*

v

**THE INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS,
FORGERS AND HELPERS, AFL-CIO, *Defendant-Appellant.***

**APPEAL FROM THE UNITED STATES DISTRICT
COURT OF THE SOUTHERN DISTRICT
OF ALABAMA.**

(DECEMBER 22, 1969)

**Before THORNBERRY, MORGAN and CARSWELL,
Circuit Judges.**

PER CURIAM: Pursuant to Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See *Murphy v.*

Houma Well Service, 5 Cir., 1969, 409 F. 2d 804, Part I; and *Huth v. Southern Pacific Company*, 5 Cir., 1969, — F. 2d —, Part I [No. 27439, Oct. 7, 1969].

Appellee Hardeman brought this action against the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, seeking damages under the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 401, et. seq., for unlawful expulsion from the Union. The jury returned a verdict in favor of appellee in the amount of \$152,150.00 and the District Court entered a judgment in that amount.

The Union appeals, raising many of the same issues decided against it in *International Bro. of Boilermakers, Etc. v. Braswell*, 388 F. 2d 193 (5th Cir., 1968), a case arising out of the exact factual situation as that involved in the present case. The Braswell case is dispositive of those issues. We have carefully considered appellant's other specifications of error and find them to be without merit.

The judgment of the District Court is

AFFIRMED.

**United States Court of Appeals
FOR THE FIFTH CIRCUIT**

OCTOBER TERM, 1969

No. 28012

Summary Calendar

D. C. Docket No. CA 4038-66
GEORGE W. HARDEMAN, *Plaintiff-Appellee*,

v.

THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND
HELPERS, AFL-CIO, *Defendant-Appellant*.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF ALABAMA.**

Before THORNBERRY, MORGAN and CARSWELL,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

7a

the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

December 22, 1969

Issued as Mandate: JAN. 20, 1970

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23776

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, *Appellant*,

v.

E. T. BRASWELL, *Appellee*.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF ALABAMA.**

(JANUARY 12, 1968.)

Before WISDOM and GODBOLD, Circuit Judges, and
McRAE, District Judge.

WISDOM, Circuit Judge: In this action against the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, the plaintiff, E. T. Braswell, alleges that he was wrongfully expelled from the Union. He asserts that this expulsion

was in violation of his rights under the "Bill of Rights of Members of Labor Organizations" of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 401 et seq. He relies particularly on 29 U.S.C. § 411(5):

(5) Safeguards against improper disciplinary action. —No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) given a full and fair hearing.

(b) any provision of the constitution and by-laws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

Braswell seeks compensatory and punitive damages only, and not reinstatement. The jury returned a verdict in favor of the plaintiff in the amount of \$12,500, and the Court entered a judgment in that amount. The Union appeals. We affirm.

* * *

Braswell has been a member of the International since 1909, and at the time of his expulsion was a member in good standing of Local 112 in Mobile, Alabama. In the fall of 1960 there was considerable dissension in the Union over the local business manager's allegedly discriminatory assignment of jobs.¹ On October 5, 1960, the business manager, Herman B. Wise, after reading his morning mail, left his office for a local plant where he intended to engage in union business. As he walked out, George Hardeman, one of the members of the Union, met him, handed him a telegram and asked Wise, "Can you ex-

¹ The cronology of events is unclear in the record and in the briefs; the parties are not in agreement as to any of the dates. We have tried to reconstruct the sequence from the testimony offered at the trial, insofar as possible. Any inaccuracies, however, are not relevant to the issues before this Court.

plain this to me". Before Wise could finish reading it, Hardeman struck him in the face. Several other members were "standing around". One clutched at Hardeman, but another threatened to "drop him in his tracks" if he did not release Hardeman. Braswell took no part in the actual fighting but remarked to the man holding Hardeman, "You keep your hands off of him." The police were called. As Wise recounted the incident to a police officer, he pointed to Braswell and said, "And this man was standing here." At this point Braswell struck Wise in the face, breaking his nose.

Wise charged Braswell, Hardeman, and another member with violations of Article 13, Section 1 of the Subordinate Lodge Constitution² and Article 12, Section 1 of the Subordinate Lodge Bylaws.³ A local trial panel

² Article XIII, Section 1:

"Any member who endeavors to create dissention among the members; or who works against the interest and harmony of the International Brotherhood or of any District or Subordinate Lodge; who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its Subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood."

³ Article XII, Section 1:

"In addition to the offenses and penalties set out in the applicable provisions of the International and Subordinate Lodge Constitution, the following offenses and penalties shall be observed in this Subordinate Lodge, and any member who violates same shall, if found guilty after proper hearing as provided herein, be punished as warranted by the offense. "(1) It shall be a violation of three By-Laws for any member through the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office.

conducted a hearing on the charges, found Braswell guilty, and ordered his expulsion. Upon the recommendation of the Union Board the members approved the verdict. He appealed to the Executive Council of the International Union. After another hearing, the Council affirmed the decision of the trial board. Braswell made a final appeal to the President of the International. This appeal was also rejected. He was then formally expelled from the Union. None of these decisions states whether it is based on both or only one of the violations charged. On September 12, 1963, Braswell filed an amended complaint in the district court alleging that the expulsion was wrongful under LMRDA and asking for damages.

I.

Jurisdiction

The Union challenges the jurisdiction of the district court over the subject matter on the ground that the National Labor Relations Act, 29 U.S.C. § 151 et seq. preempted the cause of action.

There may be certain ambiguities in LMRDA, but the act does unequivocally state that the rights secured by the bill of rights are to be enforced through private suits and that such suits shall be brought in the district courts.⁴ Section 102 of the LMRDA, 29 U.S.C. § 412, provides:

Civil action for infringement of rights; jurisdiction:
Any person whose rights secured by the provisions of this subchapter have been infringed by any violation

⁴ Earlier versions of the legislation had provided for enforcement of the bill of rights by the Secretary of Labor and for criminal penalties for the unions and union officials who committed such violations of their provisions. In the final version, Congress left enforcement of these rights entirely to private suits. See Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 Minn. L.Rev. 199, 216-17 (1960).

of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

At the same time, under Section 103, 29 U.S.C. § 413, union members retain whatever rights and remedies they may have "under any State or Federal law or before any court or other tribunal, or under the Constitution and Bylaws" of their unions.

The Union relies on *San Diego Building Trades Union v. Garmon*, 1959, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775. In *Garmon* the Court held:

"When an activity is *arguably* subject to § 7 and § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245. (emphasis added).

The Union suggests that the expulsion of Braswell was "*arguably*" and unfair labor practice under the NLRA, and that exclusive jurisdiction therefore lies with the NLRB. This assertion is erroneous on two counts.

First, the purpose of the *Garmon* rule is to prevent conflicts between federal and state policy. Here, if there is any conflict at all, it is between two federal organs expressing federal policy, and Congress has declared that federal courts, and not the National Labor Relations Board are to have the primary role. "*Garmon* . . . merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations. . . . The purpose of Congress is the ultimate touchstone." *Retail Clerks International Association v. Schermerhorn*, 1963, 375 U.S. 96, 103, 94 S.Ct. 219, 11 L.Ed.2d 179.

Second, the cause of action here involved is not arguably subject to the jurisdiction of the Board. When a dispute is solely between the member and his union and does not directly concern rights granted by the NLRA, the preemption doctrine does not come into play. *International Association of Machinists v. Gonzales*, 1958, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018; *Local 100, United Association of Journeymen and Apprentices v. Borden*, 1963, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed.2d 638; *Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko*, 1963, 373 U.S. 701, 83 S.Ct. 1429, 10 L.Ed.2d 646. See also *Vaca v. Sipes*, 1967, 386 U.S. 171, S.Ct. , 17 L.Ed.2d 842.

The question is one of congressional intent—did Congress intend to give the NLRB exclusive primary jurisdiction over the subject matter? In both *Borden* and *Perko* the Court answered “yes”. But neither the preemption doctrine nor the primary jurisdiction doctrine has constitutional bases. A clear indication therefore of congressional intent to confer jurisdiction on the federal district courts to award damages for actions—even if these actions were arguably violations of the NLRA and within the jurisdiction of the NLRB—would control.⁵

The result is in accord with other federal courts which have passed on the question. See *Addison v. Grand Lodge of International Association of Machinists*, 9 Cir. 1962, 300 F.2d 863; *Parks v. International Brotherhood of Electrical Workers*, 4 Cir. 1963, 314 F.2d 886, 922-3, cert. denied, 372 U.S. 976; *Rekant v. Shohtay-Gasos Union Local 446, Amalgamated Meat Cutters and Butcher Workmen*

⁵ For many years, before the passage of LMRDA, state courts heard suits by union members against their unions alleging that they had been unfairly disciplined or expelled. See Summers, *The Law of Union Discipline: What the Courts do in Fact*, 70 Yale L.J. 175 (1960). There is nothing here to indicate an unfair labor practice under the NLRA that would bring the Garmon doctrine into play.

of *North America*, 3 Cir. 1963, 320 F.2d 271, 273-75; *Grand Lodge of International Association of Machinists v. King*, 9 Cir. 1964, 335 F.2d 340, 346-47; cert. denied, 379 U.S. 920; *Burns v. United Brotherhood of Carpenters and Joiners of America, Local 626*, D. Del. 1962, 204 F. Supp. 599, 601-02.⁶

The appellant's attempt to argue that the conduct of which appellee complains constitutes an unfair labor practice (coercion of an employee in the exercise of his rights or of an employer to discriminate) is of no relevance. Even if the conduct is arguably subject to the NLRA (which is doubtful), it is *also* a violation of the LMRDA Act. A clear Congressional directive that federal courts have jurisdiction to entertain suits for damages has precedence over application of the primary jurisdiction rule. We hold that the district court had jurisdiction of this action under Section 412.⁷

II.

Jury Trial

In his amended complaint, Braswell demanded a trial by jury. The Union made a timely motion to strike this demand. The district court denied the motion, and the case was heard and decided by a jury. The Union renews here its objection to the jury trial.

⁶ In *Barunica v. United Hatters, Cap and Millinery Workers, Local 55*, 8 Cir. 1963, 321 F.2d 764, a complaint alleging that the union had unlawfully failed to refer the plaintiff out on employment was dismissed as not stating a cause of action under LMRDA, the court noting that it was properly an unfair labor practice cognizable before the NLRB. See *Thatcher, Rights of Individual Union Members Under Title I and Section 610 of the Landrum-Griffin Act*, 52 Georgetown L.J. 339, 361-62 (1964).

⁷ The very union which is appellant here has defended other suits brought under the jurisdiction of § 412. *Vars v. International Brotherhood of Boilermakers*, D. Conn. 1962, 205 F. Supp. 943 *affirmed*, 2 Cir. 1963, 320 F.2d 576; *International Brotherhood of Boilermakers v. Rafferty*, 9 Cir. 1965, 348 F.2d 307.

The Act itself does not indicate whether a jury trial is to be granted for suits under Section 412. The language of the jurisdictional grant, that "such relief (including injunctions) as may be appropriate" may be afforded indicates that Congress contemplated the entire range of remedies, both legal and equitable. Braswell sought only damages; he did not ask to be reinstated in the Union which had expelled him. In traditional terms, then, his cause of action was purely "legal" in nature.

We find only two federal cases on the question whether a jury trial is required in an action for wrongful expulsion under LMRDA. In *McCraw v. United Ass'n of Journeymen and Apprentices*, 1965, 341 F.2d 705, 709-10, the Sixth Circuit held that a section 412 proceeding was one unknown at common law, and therefore not within the guarantee of the Seventh Amendment. The Court characterized the proceeding as one in equity for reinstatement, with damages merely an incident to relief, and therefore held that a jury trial was not proper. In *Simmons v. Avisco, Local 713, Textile Workers Union of America*, 1965, 365 F.2d 1012, the Fourth Circuit rejected the *McCraw* holding. Judge Sobeloff, for the Court, held that although LMRDA created new rights, and the cause of action was partly equitable, the plaintiff did not lose the right to a jury trial:

The right asserted is indeed one created by statute, but we do not agree that a jury trial is necessarily unavailable because the suit for damages is one to vindicate a statutory right. There is no such cleavage between rights existing under common law and rights established by enacted law, where the relief sought is an award of damages. [citing cases and authorities]

The plaintiff here is suing at both law and in equity. He seeks an injunction to effect his restoration to membership. He also seeks money damages for injury to reputation, and resulting mental anguish—a cause of action of which the developing common law of torts certainly takes cognizance. We see no reason for not

allowing a jury to determine whether the union's wrongful conduct was the proximate cause of the plaintiff's injuries and how much the plaintiff is entitled to recover therefor. . . . Where issues underlying equitable and legal causes of action have been exactly the same, the Supreme Court has been careful to preserve a litigant's right to jury trial on the factual issues, even where a stronger basis was presented for equitable than for legal relief. See *Dairy Queen v. Wood*, 1962, 369 U.S. 469, 473, 82 S.Ct. 894, 8 L.Ed.2d 44; *Thermo-stich, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961).

We find Judge Sobeloff's reasoning persuasive. We need not decide, however, whether a plaintiff is always entitled to a jury trial in a section 412 action seeking both legal and equitable relief. Here, where the plaintiff prays for money damages only, the action cannot be characterized as one for reinstatement with money damages as incidental. Here he should be entitled, at his request, to have a jury determine whether the Union's wrongful conduct was the proximate cause of his injuries and the amount of his damages. The district court correctly denied the Union's motion to strike the jury trial demand.

III.

The Expulsion

Braswell does not deny that he struck Wise in the face and broke his nose. The question is whether this act constituted a violation of the Union Constitution and Bylaws that would justify his expulsion.⁸ As noted, the Union

⁸ Section 101(a)(5) of the LMRDA provides that, except for non-payment of dues, no union member may be "suspended, expelled, or otherwise disciplined" unless he has been "(A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." Several of the twelve counts in Braswell's amended complaint alleged procedural defects in the manner of selection of the union trial board,

charged Braswell with violations of two provisions, set out in footnotes 2 and 3. The union trial board simply returned a general verdict of guilty, without specifying whether Braswell violated both or only one of the sections. Since expulsion is mandatory under Article XIII, Section 1 and is also permissible under Article XII, Section 1 of the bylaws if warranted by the offense, the penalty affixed is of no help in determining the scope of the trial board's finding.

The district court found as a matter of law that there was no evidence to support a finding of guilt under Article XIII of the Constitution. For reasons to be stated, we agree with this finding. The district court declined to rule on whether Braswell violated Article XII of the bylaws, because there was no evidence in the record that the expulsion rested upon a "conviction" under that article. In view of the invalidity of the first charge and the failure to specify by the union board, Braswell was prejudiced in his defense and appeal and the expulsion was therefore invalid. While such lack of specificity might constitute a violation of the administrative due process guaranteed by Section 411(5), we reach the same result on the ground that, under the authorities, Braswell's expulsion was not valid under either provision mentioned in the charges. "[A] union cannot discipline its members except for offenses stated in its constitution and by-laws and . . . courts lack the power to recognize 'implied offenses' and thereby rewrite the union's constitution." *Simmons v. Local 713*, 350 F.2d 1012 (4th Cir., 1965).

This Court dealt with a very similar question recently in *Allen v. International Alliance of Theatrical, Stage Em-*

the notice given to Braswell of the trial, the manner in which the hearing was conducted, and domination of the trial board by Wise, the complainant. The trial court ruled against Braswell on several of these, and did not formally rule either way on others. As Braswell took no exception to these rulings below, and does not contest them here, these matters are not before this court.

ployees and Moving Picture Operators, 5 Cir. 1964, 338 F.2d 309. Allen was expelled from his union on a charge that he had violated a provision of the constitution which, by its terms was inapplicable to him. The evidence, however, established that he was guilty of violating another provision of the constitution, but he was not charged under that provision. In affirming the judgment of the district court, finding the expulsion unlawful and awarding reinstatement and damages, we stated:

"It is well established that penal provisions in union constitutions must be strictly construed. In *McCraw v. United Ass'n of Journey [sic] & App. of Plumbing etc., Inc.*, [sic] E.D.Tenn. 1963, 216 F.Supp. 655, 662, a decision under the Landrum-Griffin Act, the Court pointed out: "In determining whether discipline was properly imposed *** any ambiguity or uncertainty in the constitution must be construed against the union and in favor of the member, in accordance with well established principles of documentary construction.'" 338 F.2d at 316.

Here, as in *Allen*, we also rely on *Vars v. International Brotherhood of Boilermakers*, 2 Cir. 1963, 320 F.2d 576, 578. There the court observed:

"[I]mplicit in the requirement of a full and fair hearing is the requirement that there be some evidence to support the charges made. . . . Thus, although the courts may be without power to review matters of credibility or of strict weight of the evidence, a close reading of the record is justified to insure that the findings are not without any foundation in the evidence."

Applying these principles to the undisputed underlying facts we find that the act charged to Braswell was a blow struck in anger, and nothing more. However reprehensible this act may be, it did not constitute a violation of the provisions in the charges. Article XIII, Section 1 of the constitution on its face is directed as threats to the union as an organization and to the effective carrying out of

the union's aims. Braswell's fist was not such a threat. Article XII, Section 1 of the bylaws proscribes the use of force or violence where the purpose of such force is to prevent an officer of the union "from properly discharging the duties of his office." There is no evidence that Braswell was motivated by this purpose when he struck Wise. Accordingly, we affirm the ruling of the district court that the expulsion was unlawful under Section 411(5).

IV.

Compensatory Damages

The trial judge charged the jury that if it found that Braswell had suffered any actual damages as a proximate result of his unlawful expulsion, he should be awarded an amount to compensate him for such loss. Compensatory damages are proper relief for an unlawful expulsion under LMRDA. See *Simmons v. Avisco, Local 713, Textile Workers Union*, 4 Cir. 1965, 350 F.2d 1012. As the jury was instructed also on punitive damages, discussed below, and brought in a general verdict, without stating what amounts were allotted to the two types of award, we must assume that some part may have been compensatory. The Union asserts that there was insufficient evidence on the record to support an award of compensatory damages. It is true that Braswell's claim that he lost union insurance and welfare rights was sufficiently countered by testimony and documents showing that he was not eligible, even had he remained a member, but there was testimony regarding the average earnings of a boilermaker, that non-union members would find difficulty in securing work, and regarding Braswell's earnings before and after his expulsion, from which the jury might have found that he was damaged. We find no fault with the instructions regarding compensatory damages.

V.

Punitive Damages:

The trial judge also instructed the jury that if it found that the Union had acted with "actual malice or reckless or wanton indifference to the rights of the plaintiff" it might award punitive damages; that such damages were a punishment to the wrongdoer to be related to the gravity of the wrong; and that such damages were unrelated to the award of compensatory damages. We agree that this was a correct statement of the law of punitive damages and that there was sufficient evidence for the jury to find that the Union had acted with malice or wanton indifference. The Union contends, however, that LMRDA does not permit the award of punitive damages under any circumstances. As the jury brought a general verdict, and as the evidence regarding actual damages was slight, we cannot assume that no punitive damages were awarded, and we therefore consider this contention.

We have been able to find nothing in the legislative history of LMRDA which touches directly on this question. Three reported decisions, all in district courts, discuss the point. *Burris v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, W.D.N.C. 1963, 224 F. Supp. 277, 280-81 and *Cole v. Hall*, E.D.N.Y. 1964, 35 F.R.D. 4, 8, affirmed on other grounds, 2 Cir. 1965, 339 F.2d 881 held that the Act did not permit punitive damages,⁹ *Farowitz v. Associated Musicians of Greater New York, Local 802*, S.D.N.Y. 1965, 241 F. Supp. 895, 909, held that it did.¹⁰

⁹ Cf. *McCraw v. United Ass'n of Journeymen & App. of Plumbing, etc.* 216 F. Supp. 655, 662-63.

¹⁰ Of course, the district court in this case permitted punitive damages, and the district court in *Allen v. International Alliance of Theatrical Stage Employees and Moving Picture Operators*, 5 Cir. 1964, 338 F.2d 309, sitting without a jury awarded punitive damages, see *id.* at 314. The question was not raised on appeal in that case.

The jurisdictional provision, Section 412, permits the granting of "such relief . . . as may be appropriate." We do not agree with the court in *Cole v. Hall* that the use of the word "relief" necessarily rules out punitive damages which are strictly speaking not in the nature of relief. We feel it to be appropriate therefore to look to the purposes of LMRDA, and particularly the "Bill of Rights" section to determine whether the granting of punitive damages would serve to best effectuate those purposes.

In the statutory statement of findings and purposes of LMRDA Congress declares that there are instances of unions' "disregard of the rights of individual employees" and that it "is necessary to eliminate or prevent improper practices on the part of labor organizations . . ." 29 U.S.C. § 401. The awarding of punitive damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent.

The state courts, and particularly those of New York have had considerably more experience in curbing abuses in the internal affairs of unions than have had the federal courts in the few years since the passage of LMRDA. It is not inappropriate for the federal courts, in exercising their newly granted jurisdiction to look to this expertise as a guide. "The experience of state courts, both their successes and their failures, can provide helpful guides in devising remedies to make the statutory rights effective." Summers, *The Law of Union Discipline: What the Courts do in Fact*, 70 Yale L. J. 175, 177 (1960). With this in mind, we find persuasive the statement of the New York Supreme Court, Appellate Division, in *Fittipaldi v. Legassie*, 18 A.D. 2d 331, 239 N.Y.S.2d 792, 796:

"Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress the rights of members to a fair and democratic hearing on legitimate disciplinary charges. The very basis for the existence of unionism in our society today is the promise of employment to

those who desire to associate freely in order to obtain it. The right of the working man to the benefits of collective bargaining is too essential and valuable to be hindered, impeded and seriously damaged by irresponsible and dictatorial leaders whose dominance in any given situation does great disservice to the purpose and principles of unionism. When that right of free association is usurped by a concerted, malicious effort to deprive the individual of the safeguards built into the organization, it cannot be condoned . . . Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect."

We hold that the district court did not err in instructing the jury that it might award punitive damages. As in all remedial legislation, LMRDA should be liberally construed to effectuate its purposes.¹¹

For the reasons stated, the judgment of the district court is

AFFIRMED.

¹¹ Cf. *Simmons v. Avisco*, *supra*, 350 F.2d at 1018, 19, where the court upheld an award of \$15,000 in damages to compensate the plaintiff for injury to reputation and resulting mental anguish caused by his unlawful expulsion from the union.

FILE COPY

FILED
MAY 6 1970

JAMES DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. ~~1592~~

123

International Brotherhood of Boilermakers,
Iron Shipbuilders, Blacksmiths, Forgers
And Helpers, AFL-CIO, Petitioner

v.

George W. Hardeman, Respondent

**BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR
CERTIORARI**

Robert E. McDonald, Jr.
2503 First National Bank Building
Mobile, Alabama 36602

Attorney For Respondent

Of Counsel:

Robert E. McDonald, Jr.

INDEX

	Page
Statement of the Case	1
Reasons for Denying Writ	3
Argument	4
I. The Court below applied a Standard of Review consistent with the intent of congress and iden- tical with the Standard of Review by the Circuit Courts of Appeal	4
II. An International Union may be held liable for damages in a suit brought under Section 102, Alleging Wrongful Expulsion	8
III. The decision below is not in conflict with the Preemption principle established by decisions of this Court and other Circuit Courts of Appeal	10
IV. Section 102 of the Labor Management and Dis- closure Act does authorize an award for Future damages when proximately resulting from Wrong- ful discipline	15
V. Punitive Damages are available in suits against Unions for Wrongful discipline under L.M.R.D.A.	18
Conclusion	23

AUTHORITIES CITED

Cases

- Fittapaldi V. Legassie, 18 A.D. 2d. 331, 239 N.Y.S. 2d.
792 1
- Fulton Lodge No. 2 of International Association of
Mechanists V. Nix, 415 F. 2d. 212 2
- Harper V. Gribble, 143 Colo. 502, 355 P. 2d. 526, 46
LRRM 2860 2
- International Association of Machinists V. Gonzales
356 US 607, 78 S. Ct. 923, 2L. Ed. 1018 1
- International Brotherhood of Boilermakers, et al, V.
E. T. Braswell, 388 F. 2d. 193, Certiorari
denied 395 US 935, 20 L. Ed. 2d. 854, 88
S. Ct. 1848 5,7,14,1
- Local 207, International Association of Bridge,
Structural and Ornamental Iron Workers
Union, et al, V. Jacob Perko, 373 US 708 (1963) 1
- Local 20, Teamsters, Chauffers, Helpers Union, etc.
V. Morton, 337 US 52 1
- Local 100, United Association of Journeymen and
Apprentices V. Borden, 373 US 690 1
- Linn V. United Plant Guard Workers, 383 US 53 1
- Manning V. Kennedy, 320 Ill. App. 11, 49 N.E. 2d.
658 2
- St. Louis S.W. Ry. Co. of Texas V. Thompson, 113
S.W. 144 2
- Taxi Cab Drivers Local Union No. 889 V. Pittman,
322 P. 2d. 159 2
- Vapor Blast Shop Workers V. Simon, 305 F. 2d. 717, 1

Statutes

Labor Management Reporting and Disclosure Act	
(73 Stat. 523, 29 U.S.C. Sections 401,	
et seq.):	
29 U.S.C. 401	19
29 U.S.C. 411 (4)	9, 10
29 U.S.C. 411 (5)	4, 9, 18
29 U.S.C. 412	9, 10, 13, 14, 15, 18

Union Provisions

Subordinate Lodge Constitution	
Article XIII, Section 1	5, 6
Subordinate Lodge Bylaws	
Article XII, Section 1	5, 6, 7

IN THE
Supreme Court of the United States

October Term, 1969

No. 1392

International Brotherhood of Boilermakers,
Iron Shipbuilders, Blacksmiths, Forgers
And Helpers, AFL-CIO, Petitioner

George W. Hardeman, Respondent

**BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR
CERTIORARI**

STATEMENT OF THE CASE

Respondent admits the statement of the case as set forth by the petitioner with the following exceptions:

On page 3 of petitioner's brief, petitioner states "The union was improperly failing to refer him to jobs * * *". Respondent points out that Herman Wise had been Business Manager of the local continuously since 1960. ("CAT p. 300")¹ As business agent he was the individual responsible for the function of referring men to jobs (CAT 94,95). Hardeman wanted to talk to Wise about his failure to refer him to work as prescribed by union practice and regulations (CAT 104-110). This is what brought on the altercation referred to in petitioner's statement of facts.

In petitioner's statement of facts, petitioner mentions only that the Executive Council denied the appeal of Mr. Hardeman. The Executive Council's handling of the appeal was not done as a matter of review but consisted of another trial and additional evidence being taken and was therefore a trial de novo (see transcript of hearing before Executive Council).

In addition to petitioner's statement of the case, respondent points out that Hardeman sought work in the trade after losing his card from many sources and was unable to get work as a boilermaker (CAT 120, 121, 120, 131). Hardeman sought work in shops and was turned down for not having a union card (CAT 132) and was not referred out for work even though he went on the out of work list (CAT 134). He could

1. References herein are to Court of Appeals Transcript since respondent only has access to Court of Appeals Transcript and such references are designated CAT.

not go on the out of work list in lodges outside of Alabama without a union card (CAT 124, 100). Therefore he was effectively stopped from pursuing his trade as a boilermaker.

Petitioner in its statement of the case alleges that the District Court ruled that there was no evidence to support the charges (Page 6 petitioner's brief). This is an erroneous statement of the District Court's ruling. The District Court charged the jury that there was no evidence in the transcript to support a finding of guilt under the charges brought under Article 13, Section 1, which carried an automatic expulsion penalty (CAT 430, 431). The Court specifically did not rule on whether or not there was evidence in the transcript to support a finding of guilt under Article 12, Section 1 (CAT 432). The Court ruled that the expulsion was unlawful since it was a general verdict and necessarily found him guilty under both sections and demanded automatic expulsion under Article 13, Section 1 (CAT 432, 433).

REASONS FOR DENYING WRIT

I. THE COURT BELOW APPLIED A STANDARD OF REVIEW CONSISTENT WITH THE INTENT OF CONGRESS AND IDENTICAL WITH THE STANDARD OF REVIEW BY OTHER CIRCUIT COURTS OF APPEAL.

II. AN INTERNATIONAL UNION MAY BE HELD LIABLE FOR DAMAGES IN A SUIT BROUGHT UNDER SECTION 102 ALLEGING WRONGFUL EXPULSION.

II-A. THE ISSUE OF THE LIABILITY OF AN INTERNATIONAL UNION FOR ACTIONS OF A LOCAL WAS NOT RAISED ON APPEAL TO THE FIFTH CIRCUIT COURT OF APPEALS AND THIS COURT CANNOT BE CALLED UPON TO CORRECT A COURT OF APPEALS ON CERTIORARI ON AN ISSUE UPON WHICH IT DID NOT RULE.

III. THE DECISION BELOW IS NOT IN CONFLICT WITH THE PREEMPTION PRINCIPLES ESTABLISHED BY DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

IV. SECTION 102 OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT DOES AUTHORIZE AN AWARD FOR FUTURE DAMAGES WHEN PROXIMATELY RESULTING FROM WRONGFUL DISCIPLINE.

IV-A. THE ISSUE OF FUTURE DAMAGES WAS NOT RAISED ON APPEAL TO THE FIFTH CIRCUIT COURT OF APPEALS AND THIS COURT CANNOT BE CALLED UPON TO CORRECT A COURT OF APPEALS ON CERTIORARI FOR AN ISSUE UPON WHICH IT DID NOT RULE.

IV-B. PETITIONER DID NOT CONTEND ON APPEAL OR ITS PETITION FOR CERTIORARI THAT THE VERDICT WAS EXCESSIVE.

V. PUNITIVE DAMAGES ARE AVAILABLE IN SUITS AGAINST UNIONS FOR WRONGFUL DISCIPLINE UNDER L.M.R.D.A.

ARGUMENT OF RESPONDENT**I THE COURT BELOW APPLIED A STANDARD OF REVIEW CONSISTENT WITH THE INTENT OF CONGRESS AND IDENTICAL WITH THE STANDARD OF REVIEW BY THE CIRCUIT COURTS OF APPEAL**

Petitioner contends in its brief that congress did not intend the courts to review the findings of union tribunals as was done in this case. They argue that the Bill of Rights under LMRDA is purely procedural. This was not the mandate expressed by congress in 29 U.S.C. 411 (5) which states:

(5) "Safeguards against improper disciplinary action — No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been * * * (C) be given a full and fair hearing".

The courts have recognized that the notion of a "full and fair hearing" necessarily includes the principle that there must be some evidence to support a finding of guilt under the charge brought. Petitioner admits that this is the ruling of several circuit courts of appeal and supplies citations. Petitioner does not contend that any Circuit Court of Appeals has held that a court cannot examine the records of a union tribunal and set aside a finding on the basis of no evidence to support its finding and further admits that the "some evidence" rule is in keeping with the mandate of a fair hearing.

However petitioner does argue that in this case the Fifth Circuit departed from this rule and that there was evidence to support the charges. This is in keeping with petitioner's erroneous statement of the case in saying that the District

Court found that there was no evidence to support these charges. However, the District Court ruled that there was no evidence to support a finding of guilt under Article XIII, Section 1,² of the Subordinate Lodge Constitution and declined to rule on whether or not there was some evidence to support a conviction under Article XII, Section 1, of the Subordinate Lodge By-Laws. The Court further ruled that a general finding of "guilty as charges" necessarily referred to the former section and hence the expulsion was unlawful.

The Fifth Circuit examined Article XIII, Section 1, in *International Brotherhood of Boilermakers V. Braswell*, 388 F. 2nd 193, Certiorari denied 395 U.S. 835, 20 L. Ed. 854, 88 S. Ct. 1948, since Braswell was tried as a co-defendant of Hardeman under the same charges in the same union trial. They interpreted this article and stated:

"Article XIII, Section 1, of the constitution on its face is directed at threats to the union as an organization and to the effective carrying out of the union's aim. Braswell's fist was not such a threat."

Neither was Hardeman's fist such a threat. It was directed at Wise with a motivation of personal animosity.

An examination of the prohibitions of this article clearly shows that there was no evidence to support a finding of guilt under this charge.

"Any member who endeavors to create dissension among the members * * *".

No other members were involved. Hardeman's attack was directed personally at an individual, Wise.

*** * * or who works against the interest and harmony of the International Brotherhood, or of any district, or subordinate lodge; * * * This clearly refers to an attack on an organization and Hardeman's attack on an individual is by no means covered here.

*** * * who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge from the International Brotherhood; * * * nothing in this section could refer to a fight.

*** * * who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its Subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood * * * Clearly this refers to organizational activity and not an attack upon an individual.

The purposes of this article was to prohibit a member from trying to destroy a union organization from within. No attack on an officer could be remotely construed as a violation under this article.

Petitioner argues that Hardeman's attack on Wise polarized sentiment in the local and therefore Hardeman was guilty of creating dissension among the members. This argument is ludicrous. If that is the meaning of Article XIII, Section 1, it could be applied to the loser in a closely contested race for a union office since by his running it polarized sentiment between the members for two or more candidates. Such an argument is patently ridiculous.

Whether there was "some evidence" of guilt under Article XII, Section 1, is therefore irrelevant since the general

verdict of guilty necessarily referred to Article XIII, Section 1, with its automatic expulsion charge. This was the way the District Court ruled.

However to go further, as the Court of Appeals did in Braswell, Hardeman could not have been guilty under Article XII, Section 1.

"Article XII, Section 1: In addition to the offenses and and penalties set out in the applicable provisions of the International and Subordinate Lodge Constitution, the following offenses and penalties shall be observed in this Subordinate Lodge, and any member who violates same shall, if found guilty after proper hearing as provided herein, be punished as warranted by the offense.

"(1) It shall be a violation of these By-Laws for any member through the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to *prevent or attempt to prevent* (italics mine) him from properly discharging the duties of his office."

This article refers to use of force to influence the officials future action. Such was not the evidence before the board. Hardeman's attack was made in anger for vengeance against Wise's past maltreatment of him as an individual and in failing in the past to properly discharge the duties of his office by running a fair work list.

In Braswell the Fifth Circuit reached its result of an unlawful expulsion by pointing out two deficiencies. It ruled that the District Courts finding of an unlawful expulsion by bringing in a general verdict for both charges was sufficient to make the expulsion unlawful as the District Court

did in this Hardeman case. The Fifth Circuit Court of Appeals went further than the District Court in Braswell and held that:

"Article XII, Section 1, proscribes the use of force or violence where the purpose of such force is to prevent an officer of the union from properly discharging the duties of his office."

Hardeman's attack was not made to prevent anything. As in Braswell it was motivated by anger. Anger and vengeance for past maltreatment.

II

AN INTERNATIONAL UNION MAY BE HELD LIABLE FOR DAMAGES IN A SUIT BROUGHT UNDER SECTION 102 ALLEGING WRONGFUL EXPULSION.

The writ of certiorari should not be granted in regard to this issue nor should the issue be considered if the writ was granted, since this issue was not raised before the Court of Appeals. (See Appellant's Brief to Court of Appeals) Certiorari is a review of the actions of a lower court. Petitioner prays for this court to review the ruling of the Fifth Circuit Court of Appeals. This issue was not raised before the Fifth Circuit and they were not called upon to rule on it, so there is no ruling on this particular issue to be corrected.

Had the issue been properly raised, it would have to be decided adversely to petitioner. The statutory provisions upon which this cause of action is based makes the Inter-

national Union liable. 29 USC 411 (5) creates the safeguards which were violated in this act. When this section required a full and fair hearing it certainly contemplated a full and fair hearing of any appeal.

Section 411, Sub Section (4) has written into it the requirements that a member may be required to exhaust reasonable hearing procedures which contemplated appeals to International bodies. If the International violates the members rights under 29 USC 411 (5) it certainly is liable under 29 USC 412 which states:

"Any person whose rights secured by the provision of this sub-chapter have been infringed by any violation of this sub-chapter may bring a civil action in a district court of the United States, for such relief (including injunctions) as may be appropriate. * * *"

Therefore the statutory authority makes the International liable.

Petitioner cites a few old New York cases which were not decided under the provisions of L.M.R.D.A. Without the basis of L.M.R.D.A. they do not apply.

However if they did apply, their doctrine would decide this issue adversely with petitioner. This doctrine of non-liability of International Unions was applied in situations where the appellate function was only to review the proceedings below. In the instant case, the International did more than that. They tried respondent de novo. They constituted a board which took evidence, held a hearing and convicted the defendant anew. (See Executive Council's Transcript.) This was not an appellate review. Again, if it had been merely an appellate review rather than trial de

novo, the statutory sections of L.M.R.D.A, Sections 411 and 412 would still apply.

Further the New York doctrine of non-liability applied only in instances of the absence of fraud or bad faith. That did not exist in this case since there was surely bad faith on the part of the Executive's Councils board when they approved respondent's conviction of a charge without evidence to support it.

Again in this case the International had control throughout and could have corrected this gross evil. They perpetuated it and should be held liable even under the New York doctrine which would be in conflict with the statutory mandates of L.M.R.D.A.

III

THE DECISION BELOW IS NOT IN CONFLICT WITH THE PREEMPTION PRINCIPLE ESTABLISHED BY DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

Petitioner contends that the decision below is in conflict with other cases. Among them he cites Local 100, United Association of Journeymen and Apprentices V. Borden, 373 US 690. The facts in the Borden case are entirely dissimilar from the facts and cause of action in the Hardeman case before this Court. In Borden, the plaintiff had asked a business agent in Dallas to refer him to a certain job, (the Farwell Job). The contractor on this job had requested the union to send the plaintiff. The business agent refused to send the plaintiff on the Farwell Job, although he was referred to other jobs. Plaintiff brought his suit in the State Court of Texas seeking damages under the state law for the refusal of the business agent to send him out on the

Farwell job. He alleged in his complaint that the action of defendant constituted a wilful, malicious and descriminating interference with his right to contract in pursuit of a lawful occupation and defendants had breached a promise explicit in the membership agreement. i.e. not to discriminate unfairly nor to deny any member the right to work. These are not the facts in the Hardeman case before this court. In the Borden case plaintiff was not disciplined as in the case at bar. Plaintiff was not expelled from his union as in the case at bar. Plaintiff, according to the complaint as filed in the State Court, was a victim of discrimination. These facts being so in the Borden case, it is understandable that the doctrine of preemption should apply in the Borden case. The Borden case is no precedent for determining this issue in the case now before this court.

Petitioner also cites Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union, et al, V. Jacob Perko, 373 US 708 (1963). The facts in the Perko case are again dissimilar from the facts in the Hardeman case. Plaintiff had instituted his action by filing his complaint in a State Court in Ohio alleging that he had been employed as a foreman by William B. Pollack Company and that defendants had demanded the company to discharge him as a foreman and had thus procured his discharge from his job as a foreman. Since then, defendant's union had prevented him from gaining foreman jobs. There is no expulsion and no disciplinary action taken in the Perko case. The heart of the complaint was again discrimination against the complaint in the type of work that he was doing. This is not so in the Hardeman case. The heart of the Hardeman case is not discrimination but is the fact that Hardeman was expelled from his union unlawfully. Therefore, the Perko case cannot be considered precedent on this issue in the Hardeman case.

The Hardeman holding on the doctrine of preemption is completely in accord with decisions of this Honorable Court. In 1958 this Honorable Court decided *International Association of Machinist V. Gonzales* 356 US 607, 78 S. Ct. 923, 2 L.Ed. 2d. 1018. The Gonzales case was decided before passage of the Landrum-Griffith Act. It was filed in a state court alleging that complainant was expelled from his union in violation of his rights under the Union Constitution and By-Laws. This is the same type of violation alleged in the instant Hardeman case. Plaintiff sought reinstatement and damages in the state court under state law. The case was brought to the Supreme Court of the United States on the issue of preemption as raised here. This court held that the National Labor Relations Board had no jurisdiction in the Gonzales case. It further held that the National Labor Relations Act did not provide for the facts as set out in the Gonzales case and hence would not provide for the facts or the type of complaint in the instant Hardeman case. It can hardly be said now that the National Labor Relations Act preempts the Labor Management Reporting and Disclosure Act in the case at bar. Certainly this court has decided this issue when it ruled on Gonzales.

Petitioner argues that a suit which seeks reinstatement to membership for wrongful expulsion or suspension is not covered by the preemption doctrine but that a suit which seeks damages is. Again, I refer to the Gonzales case where this court held that a suit which sought damages although it sought injunctions too was not preempted by the National Labor Relations Act.

In addition to this, the damages sought are a direct and proximate result of the wrongful expulsion. After the expulsion Hardeman could not find work because he was no longer a union member. The National Labor Relations Act

would not have protected Hardeman by not being a nonunion member.

Also, 29 USC Section 412 creates a statutory right to these damages. The section says:

"Any person whose rights secured by the provision of this sub-chapter have been infringed by any violation of this sub-chapter may bring a civil action in a District Court of the United States, for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought up in the District Court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

Petitioner's argument that since respondent claims loss of wages as resulting damages as a result of his wrongful expulsion it should come under the National Labor Relations Act is in conflict with the plain directive of Section 412. Respondent's claim for loss of wages and fringe benefits as a result of this wrongful expulsion did not cause his action to be preempted by the National Labor Relations Act. The gravamen of this case was wrongful expulsion and violation of the Labor Management Reporting and Disclosure Act, and the damages claimed were the resulting damages for the violation of this act, or "****such relief as may be appropriate" as allowed in Section 412.

Respondent also contends that "such relief as may be appropriate" as stated in the act would include any damages by reason of the wrongful discipline which would include any damages including the loss of wages which would be directly or proximately caused by the wrongful discipline

or the wrongful expulsion in this case. Respondent contends that the evidence shows that by reason of his wrongful expulsion the respondent lost wages and suffered his ability to earn an income in his trade. He was effectively barred from practicing in the trade which he had followed all his life. Hence it was a direct and proximate causal relationship between the wrongful expulsion prohibited by the Landrum-Griffith Act and the loss of wages and income, hence the appropriate relief as mentioned in Section 412 under the act.

This court rejected the same argument in *International Brotherhood of Boilermakers, et al. v. E. T. Braswell*, 388 F. 2d. 193, Certiorari denied 395 US 935, 20 L. Ed. 2d. 854, 88 S. Ct. 1848. The Hardeman case before this court was a companion case to the Braswell case. Both men were disciplined under the same action and for the same incident and the same charges. The respondent in this case, Hardeman, is referred to in the statement of facts in the Braswell Decision by the United States Court of Appeals for the Fifth Circuit on page 194 of the opinion. The Fifth Circuit rejected the Preemption argument in the Braswell case and stated:

"A clear indication therefore of congressional intent to confer jurisdiction on the Federal District Courts to award damages for actions, even if these actions were arguably violations of the N.L.R.A. — would control." "****even if the conduct is arguably subject to the N.L.R.A. (which is doubtful), it is also a violation of the L.M.R.D.A. A clear congressional directive that Federal Courts have jurisdiction to entertain suits has precedence over application of the primary jurisdiction rule."

This court denied certiorari in the above cited case.

IV

SECTION 102 OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT DOES AUTHORIZE AN AWARD FOR FUTURE DAMAGES WHEN PROXIMATELY RESULTING FROM WRONGFUL DISCIPLINE

The writ of certiorari should not be granted in regard to this issue nor should the issue be considered if the writ were granted, since this issue was not raised before the Court of Appeals. (See Appellant's Brief to Court of Appeals) The only issues on damages raised in appellant's brief to the Court of Appeals was the question of the availability of punitive damages in such a suit. The only other related issue to damages was appellant's argument that there was not substantial admissible evidence submitted to support the jury's verdict. Under the latter issue, the appellant argued that the evidence introduced was illegal and not sufficient to base the verdict on. This attacked the evidence, not damages. Nowhere in appellant's brief did he argue the question of whether or not future damages were available in a Section 102 suit.

Certiorari is a review of the actions of a lower court. Petitioner prays for this court to review the ruling of the Fifth Circuit Court of Appeals. This issue was not raised before the Fifth Circuit and they were not called upon nor given the opportunity to rule on it. There is no ruling to be corrected.

However, had the issue been properly raised it would certainly have to be decided against petitioner. The statutory provisions of L.M.R.D.A. specifically allow an award of future damages. Title 29 USC Section 412 states;

"Any person whose rights secured by the provision of this sub-chapter have been infringed by any violation of this sub-chapter may bring a civil action in a District Court of the United States for such relief (including injunctions) as may be appropriate.****"

The section does not demand that such a suit include an injunction. The parenthetical expression "including injunctions" can be interpreted only as meaning that an injunction could or could not be included in a civil action. If Congress had intended that such suits be limited to injunctions with damages up to the time of injunction the section would have been worded more definitely to that effect, such as "may bring an action for injunctive relief and damages up to the issuance of the injunction".

The evidence in this particular case shows that the petitioner expelled the respondent from its membership and therefore effectively deprived him forever of pursuing his trade. Although respondent sought another trade at forty-three (43) he could not make as much money as he would have made in his chosen trade of a boilermaker. The evidence at the trial effectively showed that the respondent would have gained nothing had he forced the union to reinstate his membership. He would have then been subject to the same discrimination which resulted from the whole affair.

Petitioner argues that the lump sum of damages if invested could produce a substantial annuity for the respondent. This may be true. However petitioner committed the wrongful action against respondent and now let them pay for it. The same argument by the petitioner could apply to a loss of wages by a man disabled by an automobile accident. You could say he suffered a windfall also in that he could live

off the annuity created by his lump sum damage award. However the law clearly permits him to collect his future damages.

Respondent is in the same predicament as a disabled man. When a man is disabled in an automobile accident and because of his disability he is unable to follow his chosen profession and earn a livelihood, the tort feisor is liable to the injured party for all future wages that he will lose. The same is true of respondent herein. He suffered an injury, the loss of his union card resulting in the loss of the ability to follow his chosen profession. The defendant has committed a wrong, a tort, and is therefore a tort feisor which is subject to the right of action created by Section 412. Let them pay for the evil that they have wrought.

Respondent further points out to this Honorable Court that nowhere in appellant's brief to the Fifth Circuit Court of Appeals nor in the petition for certiorari does the petitioner claim that the verdict in this case was excessive. Apparently they realize and concede that the verdict was realistic and soundly based on the evidence and facts in the case or surely they would have raised this issue.

Petitioner cites several cases in his argument under this sub-section. None of them apply to the case at bar. They include Local 20, Teamsters, Chauffers, Helpers Union, etc. V. Morton, 337 US 52, which concerns a contractor suing a union for damages for a secondary boycott; Lynn V. United Plant Guard Workers, 383 U.S. 53, which is a libel suit by an employer against a union which was seeking to unionize the employer and the Supreme Court of the United States held that the libel action could be brought even though the District Court had dismissed the Complaint as being subject to the N.L.R.A.; Vapor Blast Shop Workers V. Simon, 305 F. 2d. 717, which is a petition for mandamus

against agents of the N.L.R.B. to compel them to seek compliance with a decree of the court enforcing an order of the N.L.R.B.

None of these cases have any bearing on this issue in the particular case before this court.

V

PUNITIVE DAMAGES ARE AVAILABLE IN SUITS AGAINST UNIONS FOR WRONGFUL DISCIPLINE UNDER LMRA.

Title 29, Section 411 is the basis of the Hardeman suit. Section 412 gives a right of action for violations of Section 411. The pertinent part of Section 412 is as follows:

"Any person whose rights secured by the provisions of this sub-chapter have been infringed by any violation of this sub-chapter may bring a civil action in a District Court of the United States for such relief (including injunctions) *as may be appropriate.*" (italics mine)

The above quoted Section 412 does not rule out punitive damages as an element of damages in such a suit brought under the Landrum-Griffith Act. I submit that the question of "relief as may be appropriate" referred to in this sub-chapter also includes punitive damages. On the trial of a case, if it appears that the action of the union was wilful, or wanton, then punitive damages would be appropriate.

The purpose of the act is to protect the rights of union members from undue wrongful discipline. I submit further that protection from wrongful discipline would also imply

punishment for wilful wrongful discipline. I, therefore, submit that under this section, if the evidence warrants, the plaintiff would be entitled to punitive damages in such amount as the jury may assess. Punitive damages would be a deterrent to unions to abuse their members within the meaning of the statute.

The Fifth Circuit Court of Appeals in the Braswell case stated:

"In the statutory statement of findings and purposes of LMRDA Congress declares that there are instances of unions' "disregard for the rights of individual employees" and that it "is necessary to eliminate or prevent improper practices on the part of labor organizations . . ." 29 U.S.C. Section 401. The awarding of punitive damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent."

In the Braswell decision on the point of punitive damages the Fifth Circuit also adopted a statement of the New York Supreme Court, Appellate Division, in *Fittapaldi V. Legassie*, 18 A.D. 2d. 331, 239 N.Y.S. 2d. 792, which is a strong argument for punitive damages:

"Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress the rights of members to a fair and democratic hearing on legitimate disciplinary charges. The very basis for the existence of unionism in our society today is the promise of employment to those who desire to associate freely in order to obtain it. The right of the working man to the benefits of collective

bargaining is too essential and valuable to be hindered, impeded and seriously damaged by irresponsible and dictatorial leaders whose dominance in any given situation does great disservice to the purpose and principles of unionism. When that right of free association is usurped by a concerted, malicious effort to deprive the individual of the safeguards built into the organizations, it cannot be condoned *** Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect."

The policy of L.M.R.D.A. is to protect union members from wrongful expulsion or other forms of wrongful discipline. It would be unreasonable to say that congress did not intend for the courts to use all in their power to protect union members from this sort of conduct. Respondent submits that to exclude punitive damages as an element of damage under L.M.R.D.A. would merely lessen the deterrent for unions from wrongfully disciplining their members. The result of this would be more wrongful discipline, and therefore, more useless litigation cluttering up our courts. Surely, this court does not want this result. The court surely wants to prevent this type of action, rather than allow it to continue and force illegally disciplined members into the courts for redress. Respondent submits that punitive damages are necessary in this type of action in order to protect not only the respondent's rights but further to protect the rights of all union members wherever they may be.

The classic reason for allowing punitive damages in any suit is the deterrent factor. The doctrine rests upon the theory that allowing punitive damages in a specific type of

suit will discourage the type of wrongful action upon which suits are brought. To rule that punitive damages are not recoverable under the L.M.R.D.A. would be to thwart the intention of congress of protecting the individual laborer in the United States from wrongful discipline by his union.

I further submit to this Honorable Court that when congress passed L.M.R.D.A. it created an action for a tort. Traditionally the type of suit which is considered a tort is one wherein an individual or legal entity has wronged another individual or legal entity which does not arise out of a contract. I submit further, that when congress created this cause of action it had in mind the doctrines that have developed in the common law regarding damages allowed in tort action. The essence of the concept of "tort" is that of a wrongful act. Surely wrongful discipline is a wrongful act. L.M.R.D.A. provides the remedy for such a wrongful act. To hold that punitive damages are not recoverable where malice or wanton indifference is present, is to hold that longstanding principals of tort are excluded under this act; to so hold would make a mockery of the old maxim, "for every wrong there is a remedy." To hold that congress did not intend punitive damages to be an element of damages where wantonness or wilfulness exists is to hold that the greatest law making body on earth is ignorant of the basic fundamentals of common law torts.

Petitioner cites Fulton Lodge No. 2 of International Association of Machinists V. Nix, 415 F. 2d. 212, Fifth Circuit 1969, which petitioner alleges holds that punitive damages do not lie under this section citing Braswell. Such is a broad statement misinterpreting the Nix case. In the last paragraph of the opinion the Fifth Circuit notes that the District Court had reserved the ruling on compensatory damages for later and also noted that the District Court had

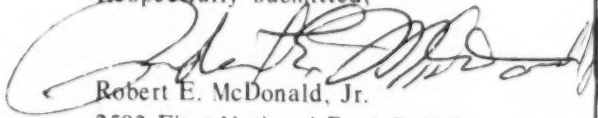
stricken the prayer for punitive damages in Nix's action. Their footnote referred to Braswell and approved it as being correct and consistent with the Braswell decision. Apparently the court was referring to the fact that it ruled in Braswell that punitive damages were available when there was wanton, or wilful conduct or malice or gross fraud. The ruling in Braswell did not allow punitive damages in the absence of maliciousness, wantonness or wilfulness or gross fraud. Apparently the Nix case presented none of these elements which the Fifth Circuit ruled in Braswell were requisite to the awarding of punitive damages. There is therefore no conflict between these two decisions.

Before L.M.R.D.A. several states allowed causes of action similar to those of the instant case which were based upon state statutes. In following the deterrent principle many have allowed punitive damages in such actions under the state statutes. See *Manning V. Kennedy*, 320 Ill. App. 11, 49 N.E. 2d 658; *Taxi Cab Drivers Local Union No. 889 V. Pittman*, 322 P. 2d 159, 41 LRRM 2045 *Harper V. Gribble*, 143 Colo. 502, 355 P. 2d. 526, 46 LRRM 2860; *St. Louis S. W. Ry Co. of Texas V. Thompson*, 113 S. W. 144.

CONCLUSION

For the fact that the rulings of the District Court and Fifth Circuit Court of Appeals are well grounded in the law and not a radical departure from accepted principals of law, the petition for Writ of Certiorari should be denied and appropriate damages under Rule 54 should be assessed against the petitioner together with interest at the rate of six per cent per annum from the date of judgment.

Respectfully submitted,

A large, stylized handwritten signature in dark ink, likely belonging to Robert E. McDonald, Jr., is written over the typed name.

Robert E. McDonald, Jr.

2503 First National Bank Building
Mobile, Alabama 36602

Certificate of Service, Alabama, Mobile County

I, Robert E. McDonald, Jr., Counsel for the Respondent, do hereby certify that I have this day served Petitioners attorneys with a true copy of the foregoing brief by mailing to its attorneys a copy thereof by United States Mail in properly stamped and addressed envelope as follows:

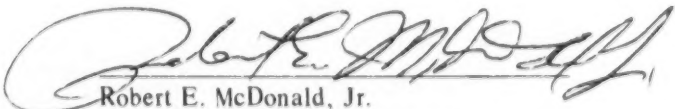
Louis Sherman — Elihu I. Leifer
Sherman, Dunn & Cohen
1200 15th St N.W.
Washington, D. C. 20005

Bernard Cushman
1001 Connecticut Ave., N.W.
Washington, D. C. 20036

John J. Blake, Attorney
570 New Brotherhood Building,
Kansas City, Kansas 66101

Donald E. Brutkiewicz, Attorney
604 — 605 Van Antwerp Bldg.,
Mobile, Alabama 36602

Dated: May 4, 1970

A large, stylized handwritten signature in dark ink, appearing to read "Robert E. McDonald, Jr.", is written over a horizontal line.

Robert E. McDonald, Jr.
2503 First National Bank Building
Mobile, Alabama 36602

FILED

AUG 3 1970

E. ROBERT SEAYER, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 123

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO, *Petitioner*

v.

GEORGE W. HARDEMAN, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

JOHN J. BLAKE
570 New Brotherhood Building
Kansas City, Kansas 66101

LOUIS SHERMAN
ELIHU I. LEIFER
1200 15th Street, N.W.
Washington, D.C. 20005

BERNARD CUSHMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys For Petitioner

Of Counsel:

SHERMAN, DUNN & COHEN
Washington, D.C.

July 1970

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Summary of Argument	7
Argument	11
I. The scope of judicial review of a union disciplinary case arising under Section 101(a)(5) of the Act is limited to the procedural due process requirements specified by said section and does not warrant substitution of a court's factual findings and interpretations of the union's constitution and by-laws for those of the union	11
A. Legislative history	11
B. State and federal court decisions on the appropriate scope of judicial review of union disciplinary proceedings	16
C. Application of the appropriate standard of review to the facts of the instant case	23
D. Conclusion	29
II. The National Labor Relations Act preempts an action brought under Section 102 of the Labor-Management Reporting and Disclosure Act wherein a former union member, claiming wrongful expulsion, does not seek restoration of membership rights but the crux of the action is a claim for damages for an alleged loss of employment due to the union's alleged failure to refer him to employers	30
A. The union conduct involved in this case is conduct which was clearly prohibited or protected by the NLRA	30

	PAGE
B. Neither state courts nor federal courts have jurisdiction to regulate conduct clearly or arguably either protected or prohibited by the NLRA	32
C. The Bill of Rights, Title I of the LMRDA, was not intended to establish a duplicate system for administering Sections 8(b)(2), 8(b)(1)(A), 8(a)(3) or 7 of the National Labor Relations Act	40
Conclusion	47
Appendix	1a

AUTHORITIES CITED

Cases

Allen v. IATSE, 338 F. 2d 309 (5th Cir. 1964)	21, 22
Amalgamated Association v. Dixie Motor Coach Corp., 170 F. 2d 902 (9th Cir. 1948)	39
Amazon Cotton Mill Co. v. Textile Workers Union, 167 F. 2d 183 (4th Cir. 1948)	39
Bartone v. Di Pietro, 18 N.Y.S. 2d 178 (Sup. Ct. 1939) ..	17
Barunica v. Hatters Local 55, 321 F. 2d 764 (8th Cir. 1963)	45
Born v. Laube, 213 F. 2d 407 (9th Cir. 1954), cert. den., 348 U.S. 855	39
Brooks v. Engar, 259 App. Div. 333, 19 N.Y.S. 2d 114, appeal dismissed without opinion, 284 N.Y. 767, 31 N.E. 2d 514 (1940)	17
Burke v. Int'l. Bn'd. of Boilermakers, 302 F. Supp. 1345 (N.D. Cal. 1967), aff'd. per curiam, 417 F. 2d 1063 (9th Cir. 1969)	18, 26
Cason v. Glass Bottle Blowers Assn., 37 Cal. 2d 134, 231 P. 2d 6 (1951)	17
A. Cestone Co., et al., 118 NLRB 669 (1957), enf'd., 254 F. 2d 958 (2nd Cir. 1958)	31

	PAGE
Classen v. United States, 142 U.S. 140	26
Construction Laborers v. Curry, 371 U.S. 542	33
Couie v. Local Union No. 1849, United Brotherhood of Carpenters, etc., 51 Wash. 2d 108, 316 P. 2d 473 (1957)	21
Day v. Northwest Division 1055, et al., 238 Ore. 624, 389 P. 2d 42 (1964), cert. den., 379 U.S. 874	36
De Mille v. American Federation of Radio Artists, 31 Cal. 2d 139, 187 P. 2d 769 (1947)	17, 21
DeVries v. Baumgartner's Electric Construction Co., 359 U.S. 498	33
Ex parte George, 371 U.S. 72	33
Fales v. Musicians Protective Union, 40 R.I. 34, 99 Atl. 823 (1917)	17
Forline v. Helpers Local No. 42, International Associa- tion of Marble Polishers, 211 F. Supp. 315 (E.D. Pa. 1962)	45
Gallagher v. Monaghan, 58 N.Y.S. 2d 618 (Sup. Ct. 1945)	17
Garner v. Teamsters Union, 346 U. S. 485	38
Gonzales v. Machinists, 142 Cal. App. 2d 207 (1956)	22
Green v. Local 705, Hotel and Restaurant Employees, 220 F. Supp. 505 (E.D. Mich. 1963)	45
Harrison v. Brotherhood of Railway & Steamship Clerks, 271 S. W. 2d 852 (Ct. of App. Ky. 1954) ...	21
Hattiesburg Building and Trades Council v. Broome Co., 377 U.S. 126	33
International Association of Machinists v. Gonzales, 356 U.S. 617	33, 34, 35, 36
International Brotherhood of Boilermakers, etc. v. Braswell, 388 F. 2d 193 (5th Cir.), cert. den. 391 U.S. 935	7, 18, 21, 22, 26, 27, 33, 38, 41, 46
Kelsey v. Local 8, IATSE, 418 F. 2d 491 (3rd Cir. 1969)	20
Lewis v. American Federation of State, County and Mu- nicipal Employees, 407 F. 2d 1185 (3rd Cir.), cert. den. 396 U.S. 866	8, 18, 19, 20, 22, 23

	PAGE
Liner v. Jafco., Inc., 375 U.S. 301	33
Lo Bianco v. Cushing, 117 N.J. Eq. 593, 117 Atl. 102, aff'd. per curiam, 119 N.J. Eq. 377, 182 Atl. 874 (1935)	17
Local 100, United Association of Journeymen and Ap- prentices v. Borden, 373 U.S. 690	10,
	31, 32, 33, 34, 35, 36, 37
Local 138, International Union of Operating Engineers v. NLRB, 321 F. 2d 130 (2nd Cir. 1963)	31
Local 207, International Ass'n. of Bridge, Structural and Ornamental Iron Workers Union, et al. v. Perko, 373, U.S. 701	10, 33, 35, 36
Local 357, International Brotherhood of Teamsters v. National Labor Relations Board, 365 U.S. 667	32
Local 1338, International Longshoremen's Association, 179 NLRB No. 67 (1969), 72 LRRM 1369	32
Longshoremen v. Ariadne, 397 U.S. 195	33
Lummus Company v. NLRB, 339 F. 2d 728 (D.C. Cir. (1964)	31
Marine Engineers v. Interlake Co., 370 U.S. 173	33
McCraw v. United Ass'n., etc., 216 F. Supp. 655 (E.D. Tenn. 1963)	21
NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 ..	8, 11, 40
NLRB v. Hod Carriers, 392 F. 2d 581 (9th Cir. 1968) ..	31
NLRB v. Penobscot Bay Longshoremen's Local 1519, 310 F. 2d 689 (1st Cir. 1962)	31
NLRB v. United Brotherhood of Carpenters, 369 F. 2d 684 (9th Cir. 1966)	31
Naylor v. Harkins, 27 N.J. Super. 594, 99 A. 2d 849 (1953)	21
Pacific Maritime Association, 155 NLRB 1231 (1965) ..	32
Parks v. Int'l. Bh'd. of Elec. Wkrs., 203 F. Supp. 288 (D. Md. 1962)	18
Phillips v. Teamsters Local 560, 209 F. Supp. 768 (D. N.J. 1962)	18
Plumbers' Union v. County of Door, 359 U.S. 354	33

	PAGE
Radio Officers Union v. NLRB, 347 U.S. 17	28
Republic Aviation v. NLRB, 324 U.S. 793	28
Rinker v. Local 24, Lithographers, 201 F. Supp. 204 (W.D. Pa. 1962)	43
Rosen v. Painters Dist. Council 9, 198 F. Supp. 46 (S.D. N.Y. 1961), appeal dismissed, 326 F. 2d 400 (2nd Cir. 1964)	18
St. Louis Southwestern Ry. Co. of Texas v. Thompson, 102 Tex. 89 (1908)	26
San Diego Building Trades v. Garmon, 359 U.S. 236 ..	9,
32, 33, 34, 35, 36, 38	
Savard v. Industrial Trades Union, 76 R.I. 496, 72 A. 2d 660 (1950)	21
Simpson v. Grand International Brotherhood of Loco- motive Engineers, 83 W. Va. 355, 98 S.E. 580 (1919)	21
Spica v. International Ladies' Garment Workers Union, 420 Pa. 427, 218 Atl. 2d 579 (1966)	44, 45
Thompson v. Louisville, 362 U.S. 199	19
Tomko v. Hilbert, 288 F. 2d 625 (3rd Cir. 1961)	40
UAW Local 756 v. Wyochik, 5 Wis. 2d 528, 93 N.W. 2d 336 (1958)	17
United Association of Journeymen, etc., 159 NLRB 1119 (1966)	32
United Association of Journeymen, etc., 176 NLRB No. 50 (1969), 71 LRRM 1253	32
Universal Camera Corp. v. NLRB, 340 U.S. 474	20, 28
Vaca v. Sipes, 386 U.S. 171	38
Vajtauer v. Comm'r. of Immigration, 273 U.S. 103	19
Vars v. Int'l. Bh'd. of Boilermakers, 320 F. 2d 576 (2nd Cir. 1963)	18, 20
Way v. Patton, 195 Ore. 36, 241 P. 2d 895 (1952)	21
Weber v. Anheuser Busch, Inc., 348 U.S. 468	38

Statutes

Labor-Management Reporting and Disclosure Act (73
Stat. 523, 29 U.S.C. §§ 411, *et seq.*):

	PAGE
Section 3(d)	44
Section 101	40
Section 101(a)(5)	2,
7, 8, 9, 11, 12, 15, 17, 22, 23, 30, 37, 40, 45	
Section 101(b)	3
Section 102	2, 6, 37, 41
Section 103	3, 15, 41, 42, 43
Section 603(b)	11, 43, 44
Section 609	13
National Labor Relations Act, as amended (49 Stat. 449, 29 U.S.C. §§ 151, <i>et seq.</i>):	
Section 2(1)	44
Section 7	3, 10, 31, 32, 34, 36, 40, 45
Section 8(a)(3)	3, 10, 31, 40, 45
Section 8(b)	45
Section 8(b)(1)(A)	3, 10, 31, 32, 33, 36, 40
Section 8(b)(2)	3, 10, 31, 32, 33, 36, 40, 45

Legislative History

Documents:

S. Doc. No. 10, 86th Cong., 1st Sess. (I NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 80 (hereinafter referred to as "Leg. Hist."))	12
---	----

Hearings:

Hearings before the Select Committee on Improper Activities in the Labor or Management Field ("McClellan Committee"), 85th Cong. (1957, 1958)	12
Hearings before a Joint Sub-Committee of the House Committee on Education and Labor, 86th Cong., 1st Sess. (June 10, 1959), pt. 5 at pp. 2234-47, 2285, 2286 (I Leg. Hist., pp. 1294, 1295)	16

Reports:

S. Rep. No. 1417, 85th Cong., 2d Sess. (1958)	12
---	----

	PAGE
S. Rep. No. 187, 86th Cong., 1st Sess. (April 14, 1959) (I Leg. Hist., p. 397)	13
H. Rep. No. 1147, 86th Cong., 1st Sess. (Sept. 3, 1959) (I Leg. Hist., p. 934)	14
Bills, Legislative Proposals and Debates:	
S. 1555 ("Kennedy-Ervin" Bill), 86th Cong., 1st Sess., as reported (April 14, 1959)	12, 13
"McClellan Amendment," 105 Cong. Rec. 5810, 5811-13, 5816, 5817-18, 5819, 5826, 5827 (daily ed. April 22, 1959) (II Leg. Hist., pp. 1102, 1103-05, 1108, 1109-10, 1111, 1118, 1119)	8, 13, 14, 15, 19
Section 103, 105 Cong. Rec. 5817, 5820, 6020, 6316 (daily ed. April 22, 1959) (II Leg. Hist., pp. 1109, 1112, 1229, 1259, 1845)	15, 41, 42, 43
"Kuchel Substitute," 105 Cong. Rec. 5997, 6024, 6030 (daily ed. April 24, 25, 1959) (II Leg. Hist., pp. 1220, 1233, 1239)	8, 13, 14, 15, 19
S. 1555, as passed Senate, 105 Cong. 6048 (daily ed. April 25, 1959) (II Leg. Hist., pp. 1257)	13
H.R. 8400 ("Landrum-Griffin" Bill), 86th Cong., 1st Sess., as offered in and passed House, 105 Cong. Rec. 14377 (daily ed. August 12, 14, 1959) (I, II Leg. Hist., pp. 619, 1645, 1693-1702)	13, 14
S. 1555 as passed Senate-House Conference (Sept. 3, 1959)	14
S. 1555 as passed Congress, 105 Cong. Rec. 16435, 16653-54 (daily ed. Sept. 3, 4, 1959) (II Leg. Hist., pp. 1452-53, 1738-39)	14

Union Provisions

International Lodge Constitution

Article II	22
Article V, Sections 2-3	24
Article XI	22

	PAGE
Subordinate Lodge Constitution	
Article XIII, Section 1	5, 6, 23, 26, 27
Article XIV, Section 2(d)	26
Article XIV, Section 2(e)	26
Article XVI, Section 3	22
Article XVI, Section 4	26
Article XVI, Section 18	22
Subordinate Lodge Bylaws	
Article XII(1)	4, 23, 24, 25, 26
Article XVIII	22
<i>Miscellaneous</i>	
Christensen, <i>Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy</i> , 43 N.Y.U. L. Rev. 227 (1968)	20, 22
Cox, <i>Internal Affairs of Labor Unions Under the Labor Reform Act of 1959</i> , 58 Mich. L. Rev. 819 (1960) ...	16
<i>Final Report of the National Commission on the Causes and Prevention of Violence</i> (1969)	28, 29

IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 123

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO, *Petitioner*

v.

GEORGE W. HARDEMAN, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (A. 66-67) is officially reported at 420 F. 2d 485. It is unofficially reported at 73 LRRM 2208 and 61 LC ¶10,553.

JURISDICTION

The judgment of the Court of Appeals was entered December 22, 1969 (A. 83). On March 12, 1970, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to and including April 6, 1970. The petition was filed April 6, 1970, and the writ was granted May 25, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a federal court in a Section 102 proceeding reviewing an expulsion of a member by a union may apply a standard of review whereby the court substitutes its own factual findings and interpretations of the union's constitution and bylaws for those of the union.

2. Whether the National Labor Relations Act, as amended, preempts an action brought under Section 102 of the Labor-Management Reporting and Disclosure Act wherein a former union member, claiming wrongful expulsion, does not seek restoration of membership rights but claims damages for an alleged loss of employment due to the union's alleged failure to refer him to employers.

STATUTES INVOLVED

Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act (hereinafter referred to as the "Act"), 73 Stat. 523, 29 U.S.C. § 411(a)(5), provides:

Safeguards Against Improper Disciplinary Action—
No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Section 102 of the Act, 73 Stat. 523, 29 U.S.C. § 412, provides:

Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Other relevant portions of the Act—Section 101(b), 29 U.S.C. § 411(b); Section 103, 29 U.S.C. § 413; Section 603, 29 U.S.C. § 523—are set out in an appendix of this Brief.

Relevant portions of the National Labor Relations Act, as amended, 49 Stat. 449—Sections 7, 8(b)(1)(A), 8(b)(2) and 8(a)(3), 29 U.S.C. §§ 157, 158(b)(1)(A), 158(b)(2) and 158(a)(3)—are also set out in the appendix.

STATEMENT OF THE CASE

On October 3, 1960, George W. Hardeman, a member of Local Lodge 112 of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter referred to as the "Local Lodge"), went to the union hall to see the business manager of the Local Lodge, Herman H. Wise, in an effort to obtain a job referral (A. 48, 49, 53-54).¹ One of the responsibilities of Wise as business manager was the referral of men to employers for jobs through the union hiring hall (Tr. 75, 77). When Wise said that he would have to see about it, Hardeman threatened Wise with violence if he would not give him a referral in the next day or two (A. 48, 49, 54).

On October 5, 1960, Wise left his office in the local union hall in order to go to a job site in the course of the performance of his official duties. Hardeman was in the lobby of the union hall. When Wise reached the lobby, Hardeman handed him a telegram concerning a referral to a job, and when Wise attempted to read it, Hardeman assaulted Wise, hitting him in the face and staggering him with other blows. W. C. Bell who had left the union office with Wise attempted to stop Hardeman, and E. T. Braswell who was present

¹ The Single Appendix has been cited herein as "A." References to the district court trial transcript, contained in the original proceedings transmitted and certified by the clerk of the district court, have been designated "Tr." References to the plaintiff's and defendant's exhibits introduced at the district court trial have been designated "Pl. Ex." and "D. Ex." respectively.

told Bell not to interfere. Wise returned to his office and called the police.² On the following day after a hearing in a criminal court, Hardeman was fined \$25 and costs of court for his conduct. (A. 43-46; P. Ex. 1, pp. 62-64; Tr. 60.)

Wise filed charges (A. 41-42) with the Local Lodge alleging that Hardeman's conduct constituted a violation of a provision in the Subordinate Lodge Bylaws³ providing for punishment for any member who through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate or to attempt to restrain, coerce or intimidate any official of the Local Lodge to prevent or attempt to prevent him from properly discharging the duties of his office. The charges also alleged a violation of the Subordinate Lodge Constitution providing for expulsion upon conviction of any member who endeavors to create dissension among the members or works against the in-

² Later in the day the police arrived at a time when Hardeman was not present. At that time when Wise stated to the police that Braswell, who was standing there, had been present during the assault by Hardeman, Braswell hit Wise and broke his nose. (A. 45; Pl. Ex. 1, p. 67.)

³ The bylaw provision was Article XII (1) (D. Ex. 4 (A. 62); Tr. 388), providing:

"In addition to the offenses and penalties set out in the applicable provisions of the International and Subordinate Lodge Constitution, the following offenses and penalties shall be observed in this Subordinate Lodge, and any member who violates same shall, if found guilty after proper hearing as provided herein, be punished as warranted by the offense.

"(1) It shall be a violation of these By-Laws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office."

terest or harmony of any Subordinate Lodge.⁴ Copies of the charges were served upon Hardeman on October 11, 1960. A full hearing was held before a local lodge trial committee of three members on November 12, 1960. At the hearing Hardeman was present and was represented by Robert Dobson, a union member. The hearing lasted from 10:00 a.m. to 7:15 p.m. Eight witnesses testified at the hearing, and a verbatim transcript of the hearing was made which consisted of 172 pages. (A. 39-42; Pl. Ex. 1.)⁵

The trial committee determined that Hardeman was "guilty as charged." The trial committee's determination was reported to the Local Lodge at the regular union membership meeting on December 3, 1960. The trial committee's determination of "guilty as charged" was sustained by a vote of the membership which voted by secret ballot to expel Hardeman from the organization "indefinitely." The vote in favor of expulsion was 59 for, 36 against. (Pl. Ex. 16 (A. 59); Tr. 128; Pl. Ex. 2; A. 56; Tr. 26-28.)

The Local Lodge's decision was appealed by Hardeman

⁴ The constitutional provision was Article XIII, Section 1 of the Subordinate Lodge Constitution (D. Ex. 5 (A. 63); Tr. 388), providing:

"Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Brotherhood or of any District or Subordinate Lodge; who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its Subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood."

⁵ The above statement of facts is based upon probative evidence contained in the transcript of the hearing before the union trial committee (Pl. Ex. 1), excerpts from which are set out at A. 39-55.

to defendant, the International Union. Both the International President and, subsequently, the International Executive Council denied the appeal and sustained the action taken by the Local Lodge. (Pl. Exs. 5, 16 (A. 56-60); Tr. 35, 128.)

Subsequent to his expulsion, Hardeman signed the out-of-work list maintained at the union office and was referred to a job at which he worked for five days (A. 18). The union records show that he signed the out-of-work list twice—once before and once after the five-day job—and thereafter did not sign the out-of-work list (D. Ex. 3 (A. 61); A. 26-29). The job referral rules for employment required unemployed member and nonmember applicants to report and register each month as available for employment and stated that their name would be removed from the out-of-work list in the absence of such report and registration (D. Ex. 3 (A. 61); A. 29-31).

On April 4, 1966, more than five years after the disciplinary action was taken and sustained on appeal,⁶ Hardeman filed a complaint in the federal district court purporting to base jurisdiction on Section 102 of the Labor-Management Reporting and Disclosure Act. 29 U.S.C. § 412. The complaint, filed against the International Union alone, prayed solely for damages, consequential and punitive, and did not seek reinstatement to membership. (A. 2-7.) The only evidence adduced at the district court trial relating to damages involved alleged loss of wages from the alleged failure of Hardeman to obtain and of the Local Lodge to refer him to employment as a boilermaker during the post-expulsion period (Tr. 114-119; 129; 147-149; 294-300; 316-333; 358-362; 368; 406-407; D. Ex. 3 (A. 61)). Hardeman testified only that, subsequent to the loss of his union card, he was unable to work in the boilermaker's trade beyond one job

⁶ On September 12, 1963, Braswell had filed a complaint in the district court under Section 102, and on February 16, 1966, was awarded \$12,500 in damages (A. 71, 69).

lasting five days (A. 19). He also testified, however, that, during the year *prior* to his expulsion, he only worked five days "out of the Local" (Tr. 129). Richard Kittrell, a witness called by Hardeman, testified that men work regularly out of the local without a union card (A. 35).

Mortality tables were introduced at the trial and Hardeman testified that he earned \$5500-\$6000 per year prior to his expulsion from the union (Tr. 127, 202). On this basis, counsel for Hardeman argued to the jury that Hardeman's consequential damages were at least \$130,231.52, which represented his past and future loss of wages from the date of his expulsion in 1960 until his projected retirement in 1983 at age 65 (Tr. 413-417).

At the conclusion of the trial, the district court found as a matter of law that the expulsion was unlawful under the full and fair hearing clause of Section 101(a)(5) (A. 36-38). The court then charged the jury that it could find both compensatory and punitive damages (Tr. 446-447). The jury returned a verdict for Hardeman in the amount of \$152,150.00, and the district court entered a judgment in that amount (A. 64-65).

The Court of Appeals affirmed. The court's *per curiam* opinion (A. 66-67) adopted the opinion in *International Brotherhood of Boilermakers, etc. v. Braswell*, 388 F. 2d 193 (5th Cir.) (A. 68-82), as the basis for its holding, describing that case as a case "arising out of the exact factual situation as that involved in the present case" (A. 67).

SUMMARY OF ARGUMENT

I.

Section 101(a)(5) provides procedural standards to be observed in union disciplinary proceedings. The scope of judicial review of such proceedings in cases involving this Section is limited to ascertaining whether such procedural safeguards have been provided. A reviewing court may not

substitute its own factual findings or its own interpretations of the union's constitution and bylaws for those made by the union.

The legislative history, including, among other things, the adoption of the Kuchel Substitute Bill of Rights which did not require, as did the McClellan Bill of Rights, that discipline be imposed solely for breach of published written rules of the union or that a transcript be made of union disciplinary hearings, demonstrates that Section 101(a)(5) was limited to the specified "procedural due process" standards and that great care was taken "not to undermine union self-government." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194.

The scope of judicial review must be viewed in the light of the Congressional intent and the role of the courts is to see that the enumerated safeguards were observed. In determining whether a full and fair hearing was had, state and federal court decisions show that a reviewing court should employ a standard of whether there is some evidence to support the union's determination. *Lewis v. American Federation of State, County and Municipal Employees*, 407 F. 2d 1185 (3rd Cir.). All the federal circuit courts of appeals which have dealt with the question have held that such a standard is the correct one to apply in a Section 101(a)(5) proceeding. That standard may be abused where a court, as here, articulates the standard but misapplies it by overreaching in rejecting or ignoring evidence which supports the union finding. The standard is subject to abuse also if the reviewing court substitutes its interpretation of a union's constitution and bylaws for the union's interpretation where that interpretation is not arbitrary and unreasonable. That principle is distilled from the common law. The court below mistakenly asserted a principle of strict construction which has no foundation in the language of the Act, the legislative history or the common law. The union's

interpretation of its organic law in this case was correct and, *a fortiori*, reasonable.

The facts in the instant case show that the respondent was expelled for committing a physical assault upon the business manager for the purpose of affecting the administration of the referral system. That such conduct violated the express bylaw provision against using violence to restrain, coerce or intimidate a union official in performance of his duties, as well as the constitutional provision against provoking dissension or working against the interest and harmony of the Lodge, is a correct determination and, *a fortiori*, is consistent with the some evidence rule.

II.

Where conduct arguably is protected or prohibited by the National Labor Relations Act, the National Labor Relations Board has primary exclusive jurisdiction and state and federal courts have no jurisdiction to regulate such conduct. *San Diego Building Trades v. Garmon*, 359 U.S. 236. Here the crux of the case is the employment relationship, the failure or refusal of the union to refer respondent to jobs. Respondent never sought restoration of union membership at any stage of the proceedings, either in his pleadings or at trial. While the respondent purported to be suing under Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act, he sought not membership rights but only a sum of money as damages for loss of job opportunities on a theory of lifetime unemployment. He sought no relief in equity. On the actual record of the case he did not at trial introduce any evidence of loss of union membership benefits such as insurance or retirement benefits. Hence, Landrum-Griffin Title I rights are not principally involved.

The union conduct which is principally involved is conduct which is either prohibited or protected under the National Labor Relations Act. For a union to refuse or fail to refer a non-member to employment through the union's

hiring hall because he is a non-member is a familiar and now classic unfair labor practice in violation of §§ 8(b)(2) and 8(b)(1)(A) of that Act. On the other hand, if the hiring hall conduct had been before the Board, its appraisal of the conflicting testimony might have led it to find the particular union conduct was protected under Section 7 as concerted activity in that any failure to refer respondent was due to his failure to comply with valid rules pertaining to the administration of the hiring hall. Hence, the principles of *Garmon* come into play.

This case is governed by *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, and *Local 207, International Ass'n. Bridgeworkers, etc. v. Perko*, 373 U.S. 701. *Borden*, too, was a hiring hall case. In *Borden*, as here, there was refusal to refer and in *Borden* and *Perko* this Court held that, where the suit "focuses principally, if not entirely on the union's actions with respect to [Hardeman's] efforts to obtain employment" (*Borden, supra*, 373 U.S. at 697), relief may be sought only from the Board and "the label affixed to the cause of action" does not control (*Borden, supra*, 373 U.S. at 698).

The Landrum-Griffin Act extended national labor policy to the relationship between unions and their members. Title I, the bill of rights, deals specifically with the relationship between union members and their union. Congress established certain membership rights which a union may not deny. But these rights are membership rights, not employment rights. The protection of job rights against unfair labor practices by management and unions was left to the Labor Management Relations Act. Congress did not intend, by enacting the Bill of Rights, to establish a duplicate system for administering §§ 8(b)(2) or 8(b)(1)(A) or 8(a)(3) or 7 of the NLRA by trial by jury in the federal district courts. The legislative history of Title I demonstrates that the body of preexisting law relating to the exclusive primary jurisdiction of the National Labor Relations Board

was left intact. This conclusion is reinforced by Section 603(b) of Landrum-Griffin providing that nothing in any title of Landrum-Griffin affects the right of any person under the NLRA. "Person" includes a labor organization, which is protected by Section 7 in the lawful operation of referral systems. Furthermore, to read Title I as affording union members rights to damages, past and prospective, on a theory of lifetime unemployment for conduct prohibited by the NLRA, while non-members would be restricted to the reinstatement and backpay remedy provided under the NLRA, is to give Congressional intent in enacting Landrum-Griffin an unlikely reading.

ARGUMENT

I.

The scope of judicial review of a union disciplinary case arising under Section 101(a)(5) of the Act is limited to the procedural due process requirements specified by said Section and does not warrant substitution of a court's factual findings and interpretations of the union's constitution and by-laws for those of the union.

Section 101(a)(5) provides that "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." On its face, this section is purely procedural.

A. Legislative History

The legislative history of the "Bill of Rights" Title (Title I) is in accord with the clear meaning of the statutory language. As stated by this Court in *NLRB v. Allis-Chalmers Manufacturing Company*, 388 U.S. 175, 194:

"... In 1959 Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subject to discipline. Even then, some Senators emphasized that 'in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents.' S. Rep. No. 187, 86th Cong., 1st Sess., 7. . . . Indeed that Congress expressly recognized that a union member may be 'fined, suspended, expelled, or otherwise disciplined, and enacted only procedural requirements to be observed.'"

Section 101(a)(5), and the "bill of rights" title must be understood against the backdrop of the hearings in 1957 and 1958 of the Select Committee on Improper Activities in the Labor or Management Field, popularly known as the "McClellan Committee," which provided the impetus for enactment of the Act. The Committee was principally concerned with the misuse of union funds by dishonest officers, illicit profits, violence and racketeering within a small group of labor organizations, and in its later days, with secondary boycotts and organizational picketing. These concerns were reflected by the committee's five "interim" recommendations in March 1958,⁷ and later, by the recommendation in President Eisenhower's message on January 28, 1959.⁸ Insofar as "union democracy" was concerned, the proposals were directed to trusteeships and elections and did not involve union disciplinary proceedings at all.

The Act began its course through the 86th Congress as S. 1555, the "Kennedy-Ervin" Bill. As introduced on March 25, 1969, and as favorably reported three weeks later by the

⁷ S. Rep. No. 1417, 85th Cong., 2d Sess. 450, 452.

⁸ S. Doc. No. 10, 86th Cong., 1st Sess., NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, Vol. I, p. 80 (1959) (this 2 volume publication is hereinafter referred to as "*Leg. Hist.*").

Senate Committee on Labor and Public Welfare,⁹ it contained no "bill of rights" title, being limited to reports and disclosures, elections, including the right of members to nominate and vote for officers and to hold office, trusteeships, and an encouragement to unions to voluntarily adopt codes of ethical practices. The bill contained a provision (§ 506(a)) analogous to Section 609 of the Act proscribing discipline for exercising the statutory rights afforded by the bill.¹⁰

The "bill of rights" title was offered as an amendment on the Senate floor by Senator McClellan on April 22,¹¹ and voted through on the same day by the narrow margin of one vote. The record vote was 47-46.¹² The strong opposition to this legislative measure regulating the internal affairs of trade unions resulted in the compromise draft of the "bill of rights" which was offered two days later by Senator Kuchel for himself and a number of other Senators as a substitute for the McClellan amendment.¹³ On April 25, the "Kuchel Substitute" was adopted by a vote of 77-14.¹⁴ That same day, S. 1555 passed the Senate.¹⁵ In the House, the Landrum-Griffin Bill (H.R. 8400) was offered on the House floor on August 12, 1959, as a substitute for a committee-reported bill.¹⁶ Although Landrum-Griffin differed substantially from S. 1555 in certain other respects, the provisions of its "bill of rights" title were substantially

⁹ S. Rep. No. 187, 86th Cong., 1st Sess. (April 14, 1959), I *Leg. Hist.*, p. 397.

¹⁰ S. 1555, as reported, I *Leg. Hist.* 338.

¹¹ 105 Cong. Rec. 5810 (daily ed.), II *Leg. Hist.*, p. 1102.

¹² *Id.* at 5827, *Id.* at 1119.

¹³ *Id.* at 5997, *Id.* at 1220.

¹⁴ *Id.* at 6030, *Id.* at 1239.

¹⁵ *Id.* at 6048, *Id.* at 1257.

¹⁶ *Id.* at 14377, *Id.* at 1645.

the same as the Kuchel Substitute.¹⁷ The "Bill of rights" title (Title I) then was passed unchanged by the House,¹⁸ a Senate-House Conference,¹⁹ and the Congress.²⁰

With respect to disciplinary proceedings, the McClellan Amendment itself, while providing more restrictive procedural requirements than those finally adopted in the Kuchel Substitute, was limited to guaranteeing specific enumerated procedures surrounding the disciplinary hearing. The McClellan Amendment included a prohibition against discipline "except for breach of a published written rule of such organization which is not inconsistent with any of the provisions of this Title" and a provision for "final review on a written transcript of the hearing by an impartial person."²¹

¹⁷ H.R. 8400, I *Id.* at 619.

¹⁸ 105 Cong. Rec. 14532-14541 (daily ed. Aug. 14, 1959), II *Id.* at 1693-1702.

¹⁹ H. Rep. No. 1147 on S. 1555 (Sept. 3, 1959), I *Id.* at 934.

²⁰ 105 Cong. Rec. 16435, 16653-54 (daily ed. Sept. 3, 4, 1959), II *Id.* at 1452-53, 1738-39.

²¹ Section 101(a)(6) of the McClellan Amendment provided:

"Safeguards against improper disciplinary action. —No Member of any such labor organization may be fined, suspended, expelled or otherwise disciplined by such organization or any officer thereof except for breach of a published written rule of such organization which is not inconsistent with any of the provisions of this title. Disciplinary action may not be taken unless such member has been (A) served with a written copy of the provisions of the constitution and bylaws or other governing charter of such organization which contains a listing of the rights and safeguards afforded him pursuant to this title with respect to the conditions under which disciplinary action may be taken; (B) served with written specific charges; (C) given a reasonable time to prepare his defense; (D) afforded a full and fair hearing; and (E) afforded final review on a written transcript of the hearing, by an impartial person or persons (i) agreed to by such organization and the accused, or (ii) designated by an independent arbitration or mediation association or board." 105 Cong. Rec. 5810 (daily ed.), II *Leg. Hist.*, p. 1102.

But, even the more extensive "McClellan Amendment" requirements were supported by their sponsor in terms of guaranteeing good faith by union officials and basic constitutional rights for union members.²² And Senator Kennedy stated, with the apparent agreement of the Amendment's sponsors,²³ that the Amendment was more limited in the federal rights it established than the common law.²⁴

The McClellan Amendment was subjected to attack by the sponsors of the Kuchel Substitute on the ground that the specified procedural requirements—particularly the "published rule" and transcript requirements—were excessively cumbersome and onerous in the context of union life.²⁵ As noted, the Kuchel Substitute, whose provision on union discipline was identical to Section 101(a)(5) of the Act, was overwhelmingly approved to replace the McClellan Amendment. Of significance was its removal from the McClellan Amendment of the requirements that discipline be imposed solely for breach of published written rules of the union, or that a transcript be made of union disciplinary hearings.

Following the Senate passage of S. 1555, Senator McClellan testified in favor of the Kuchel Substitute "bill of

²² 105 Cong. Rec. 5811-13 (daily ed., April 22, 1959), II *Leg. Hist.*, pp. 1103-05.

²³ The response by McClellan and the supporters of his proposal to Kennedy's argument was the necessity of including a clause precluding preemption of the common law. The result was Section 103, offered by Senator McClellan and adopted on the Senate floor. (105 Cong. Rec. at 5817, 5820, 6316 (daily ed., April 22, 29, 1959), II *Leg. Hist.* 1109, 1112, 1259.)

²⁴ 105 Cong. Rec. 5817-18 (daily ed. April 22, 1959), II *Leg. Hist.* 1109-10.

²⁵ *Id.* at 5811, 6024 (Senator Clark), 5819 (Senator Morse), 5826 (Senator Kennedy), *Id.* at 1103, 1233 (Senator Clark), 1111 (Senator Morse), 1118 (Senator Kennedy).

rights" before a Joint House Subcommittee.²⁶ McClellan asserted that the Substitute was intended as a compromise to his own Amendment, and stated that the Substitute was "a compromise bill of rights acceptable to the unions."²⁷ He stated that it was drafted "in consultation with the labor leaders of the AFL-CIO and others."²⁸ He emphasized that the country must continue to have strong unions,²⁹ that the "bill of rights" title was not needed for 90 or 95% of the unions,³⁰ that the title "provides minimum, not maximum standards,"³¹ and that the language of the Substitute "is clear and explicit."³² Once again, he recognized that "the real issue now in this proposed labor reform legislation" was the corruption, racketeering and exploitation by dishonest and criminal union officers tending to subvert the right of union memberships "to manage and control their internal affairs by recognized and respected democratic process."³³

B. State and Federal Court Decisions on the Appropriate Scope of Judicial Review of Union Disciplinary Proceedings

As stated by Professor Cox in *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 838 (1960), "Section 101(a)(5) merely incorporates the common-law test of a fair hearing." The com-

²⁶ *Hearings on H.R. 3540 Before a Joint Sub-Committee of the House Committee on Education and Labor*, 86th Cong., 1st Sess., p. 5, at 2234-47, 2284-86 (1959).

²⁷ *Id.* at 2285, I *Leg. Hist.*, p. 1294.

²⁸ *Id.* at 2236.

²⁹ *Id.* at 2243.

³⁰ *Id.* at 2237.

³¹ *Id.* at 2285, II *Leg. Hist.*, p. 1294.

³² *Id.* at 2285, *Id.* at 1295.

³³ *Id.* at 2286, *Id.* at 1295.

on-law rule of fair hearing included the right to a hearing,³⁴ timely notice of the charges and of the time and place of hearing,³⁵ the right of the member to hear the evidence against him,³⁶ to examine and cross-examine and to present evidence in his own behalf.³⁷ Judicial review of disciplinary proceedings under Section 101(a)(5) would, of course, involve a review of the procedures followed to see that similar safeguards have been followed. The issues raised by the case at bar do not raise any question as to the fairness of the procedures followed in the internal union proceedings.

The issues that are raised involve the erroneous exercise of the scope of review by the court below in that it ignored the evidence before the union tribunals, which supported the determination that Hardeman violated the Subordinate Lodge Bylaws and the Subordinate Lodge Constitution, in violation of the "some evidence" rule as to the scope of review, and erroneously substituted its own interpretation of the provisions of the Union Constitution and Bylaws for the Union's interpretation, which interpretation was not unreasonable and not arbitrary.

³⁴ *Cason v. Glass Bottle Blowers Assn.*, 37 Cal. 2d 134, 145-146, 231 P. 2d 6 (1951); see *De Mille v. American Federation of Radio Artists*, 31 Cal. 2d 139, 154-55, 187 P. 2d 769 (1947); cf. *UAW Local 756 v. Woychik*, 5 Wis. 2d 528, 93 N.W. 2d 336 (1958).

³⁵ *Bartone v. Di Pietro*, 18 N.Y.S. 2d 178 (Sup. Ct. 1939); *Cason v. Glass Bottle Blowers Assn.*, *supra* at 144; *Fales v. Musicians Protective Union*, 40 R.I. 34, 56, 99 Atl. 823 (1917); *Gallagher v. Monaghan*, 58 N.Y.S. 2d 618 (Sup. Ct. 1945).

³⁶ *Cason v. Glass Bottle Blowers Assn.*, *supra* at 144; *Brooks v. Engar*, 259 App. Div. 333, 19 N.Y.S. 2d 114, *appeal dismissed without opinion*, 284 N.Y. 767, 31 N.E. 2d 514 (1940); *Fales v. Musicians Protective Union*, *supra*, 40 R.I. at 57.

³⁷ *Cason v. Glass Bottle Blowers Assn.*, *supra* at 144; *Brooks v. Engar*, *supra*; *Fales v. Musicians Protective Union*, *supra*; *Lo Bianco v. Cushing*, 117 N.J. Eq. 593, 602, 117 Atl. 102, *affd. per curiam*, 119 N.J. Eq. 377, 182 Atl. 874 (1935).

Most of the cases which have arisen in the federal courts involving the review of union disciplinary proceedings in suits brought under Section 102 of the Act, and all the courts of appeals which have addressed themselves to the issue—including the Fifth Circuit—have held that judicial inquiry into alleged violations of Section 101(a)(5) is governed by a standard of review which confines the reviewing court to the narrow area of determining whether there is *some evidence* to support the charges made. *Lewis v. American Federation of State, County and Municipal Employees*, 407 F. 2d 1185 (3rd Cir. 1969), *cert. denied*, 396 U.S. 866; *Vars v. Int'l. Bh'd. of Boilermakers*, 320 F. 2nd 576 (2nd Cir. 1963); *Int'l. Bh'd. of Boilermakers v. Braswell*, 388 F. 2d 193 (5th Cir. 1968), *cert. denied* 391 U.S. 935; *Burke v. Int'l. Bh'd. of Boilermakers*, 302 F. Supp. 1345 (N.D. Cal. 1967), *aff'd. per curiam*, 417 F. 2nd 1063 (9th Cir. 1969); *Rosen v. Painters Dist. Council 9*, 198 F. Supp. 46 (S.D. N.Y. 1961), *appeal dismissed*, 326 F. 2d 400 (2nd Cir. 1964); *Phillips v. Teamsters Local 560*, 209 F. Supp. 768 (D. N.J. 1962); *cf. Parks v. Int'l. Bh'd. of Elec. Wkrs.*, 203 F. Supp. 288, 307 (D. Md. 1962) (“[Disciplinary proceedings] must be conducted in accordance with the requirement of due process.”).

The Third Circuit's opinion in *Lewis* contains, perhaps, the most comprehensive discussion of the problem and a persuasive showing of why any broader scope of review—including the substantial evidence test—was not intended for such proceedings. The Court characterized Congress' directive as supported by “sound judgment and policy” (407 F. 2nd at 1198), stating in part (407 F. 2nd at 1191):

“There is sound reason for the adoption of a substantial-evidence test in legislation such as the Wagner Act, the applicable areas of the Administrative Procedure Act, and the LMRDA [*sic*] of 1947: federal agencies governed by these acts perform what has traditionally been regarded as an essentially judicial function, and but for these statutorily-created tribunals, the task of

adjudicating and enforcing the legislative mandate would fall to the traditional courts of law. Considering the potential which these agencies possess to render far-reaching decisions which significantly affect the national interest and recognizing that these 'legislative courts' are relatively new to the art of adjudication and the rule of precedent and tradition which inherently characterize the judicial function, it is eminently proper that these agencies be subject to close scrutiny by the courts.

"Similar considerations are not presented in problems of internal union discipline. Such matters generally have little impact beyond the organization itself. By their very nature they have no significance as precedents in any legal sense of the word; they involve matters of organizational discipline, essentially internal in concept and effect."

The Court in *Lewis* properly relied both on the "some evidence" rule which evolved as the generally articulated and accepted standard at common law and on this Court's holding in *Vajtauer v. Comm'r. of Immigration*, 273 U.S. 103, 106, to the effect that procedural due process requires not that an order be "correct" or based on substantial evidence but that "there was some evidence from which the conclusion . . . could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial." 407 F. 2d at 1193, 1194. See also *Thompson v. Louisville*, 362 U.S. 199. The elimination of the written transcript requirement of the McClellan Amendment by the Kuchel Substitute was an implicit rejection of any fuller review process involving the evidence at the union trial.

The court below gave only lip service to the "some evidence" rule and, in fact, did not follow that rule. What it did was to substitute its own findings for those of the union membership. In so doing, the court below engaged in the kind of practice which led the *Lewis* court to emphasize the limited powers of courts in reviewing the evidence in union

disciplinary proceedings. The *Lewis* court said it was motivated to stress such limitations upon the judiciary "because . . . in reviewing the cases we have often detected fundamental differences between a court's articulation of the scope of review and its application of the announced standard" (407 F. 2d at 1198). As this Court noted in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489, "A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application." The instant case may be a glaring illustration but it is not alone. See *Vars v. Int'l. Bh'd. of Boilermakers*, 302 F. 2d 576 (2nd Cir.), as discussed in Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N.Y.U. L. Rev. 227, 251-252 (1968);³⁸ *Kelsey v. Local 8, IATSE*, 418 F. 2d 491 (3rd Cir.) (upsetting discipline on grounds of credibility of the charging party's testimony).

Even a "some evidence" rule can lead to abuse if, by reason of judicial overreaching in reviewing the meaning of the disciplinary charges (or the union rules on which they are based), evidence which could support the union's finding is improperly rejected as unsupportive. In the instant case, the courts below committed the second error as well as the first and improperly engaged in a full review of the (union) "law" as well as the (union) "facts."

³⁸ In *Vars*, the court stated (320 F. 2d at 578):

"The courts are not free to substitute their judgment for that of the trial court or to reexamine the evidence to determine whether it would have arrived at the same conclusion that was reached by the trial body. . . . However, implicit in the requirement of a full and fair hearing is the requirement that there be some evidence to support the charges made."

Christensen concludes that the court nevertheless engaged in a "rather detailed review and weighing of the various items of evidence" and substituted its judgment for that of the trial body as to the sufficiency of the evidence.

The common law enunciated by the courts with regard to the interpretation of a union's constitution and bylaws was that the union's interpretation of its organic law would govern unless such an interpretation was arbitrary and unreasonable. *Couie v. Local Union No. 1849, United Brotherhood of Carpenters, etc.*, 51 Wash. 2d 108, 115, 316 P. 2d 473 (1957); *Simpson v. International Brotherhood of Locomotive Engineers*, 83 W. Va. 355, 373, 98 S.E. 580 (1919); *Naylor v. Harkins*, 27 N.J. Super. 594, 605-06, 99 A. 2d 849 (1953); *De Mille v. American Federation of Radio Artists*, 31 Cal. 2d 139, 187 P. 2d 769 (1947); *Way v. Patton*, 195 Ore. 36, 58, 241 P. 2d 895 (1952); *Harrison v. Brotherhood of Railway & Steamship Clerks*, 271 S.W. 2d 852, 854 (Ct. of App. Ky. 1954); *Savard v. Industrial Trades Union*, 76 R.I. 496, 510, 72 A. 2d 660 (1950).

The court below applied an erroneous standard of review of the union's constitution and bylaws. The court enunciated that standard in *Braswell* (A. 78) where it mistakenly asserted that "It is well established that penal provisions in union constitutions must be strictly construed." There simply is no basis for such an assertion. The cases cited, *supra*, support the principle of union self-government that interpretations of authorized union tribunals should not be set aside unless arbitrary and unreasonable. The court relied on its own prior decision in *Allen v. IATSE*, 338 F. 2d 309, 316 (1964), which, in turn, cited a district court decision in *McCraw v. United Ass'n., etc.*, 216 F. Supp. 655, 662 (E.D. Tenn. 1963). *McCraw* (at 662) contains only a statement also quoted in *Braswell*: "In determining whether discipline was properly imposed . . . any ambiguity or uncertainty in the constitution must be construed against the union and in favor of the member, in accordance with well established principles of documentary construction." This statement in *McCraw* does not use the term "penal." Moreover, it is our view that the principles applicable to the draftsman of a commercial contract are not apposite when applied to the provisions of a union constitution which are

determined either by a referendum vote of the membership or by a convention of duly-elected delegates.³⁹ *Gonzales v. Machinists*, 142 Cal. App. 2nd 207 (1956), also cited by the court below in *Allen*, likewise contained no reference to construction of "penal" provisions, but held that a clearly erroneous interpretation by a union official of a definite and unambiguous provision was unreasonable. There the union imposed discipline without following the procedures clearly required by its own rules.

It follows, therefore, that the principle of strict construction asserted by the court below in *Braswell* is an erroneous standard of review. It is incompatible with the expressed view of this Court that Section 101(a)(5) is procedural only. Its assertion that union constitutional disciplinary provisions are to be characterized by the pejorative word "penal" has no basis in fact or in the intent of Congress in enacting 101(a)(5). In short, such an approach

"may satisfy the urge to do 'justice' and to check what is felt to be intemperate use of union power, but they [applicable cases] are not based upon visible statutory authority for the scope of their review. Conversely, they establish judicial power in precisely the most damaging fashion, i.e. by making a union's interpretations of its own basic 'law' subject to the removed, untutored, and possibly antipathetic judgment of a court." Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N.Y.U. L. Rev. 228, 254 (1968).

The Third Circuit in *Lewis* likewise recognized that Congress did not intend to substitute judicial government for union self-government under the guise of review of procedural safeguards provided for in Section 101(a)(5) (407 F. 2nd at 1191-92):

"The reasoning of the Supreme Court in the 'Tril-

³⁹ See D. Ex. 5 (Sub. Lodge Const., Art. XVI, Secs. 3, 18 (pp. 109-10, 113), Int'l. Lodge Const., Arts. II, XI (pp. 5-12, 41-43)); D. Ex. 4 (Art. XVIII), p. 9.

ogy' applies with equal force to cases arising out of internal union discipline. 'The provisions of the L.M.R.D.A. were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the operation of unions which would justify a broad power to interfere . . . General supervision of unions by courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations.' *Gurton v. Arons*, 339 F. 2d 371, 375, 58 LRRM 2080 (2 Cir. 1964)."

The upshot is a return to the procedural "due process" underpinnings of Section 101(a)(5). As long as there is some evidence to sustain a union finding of violation under any interpretation of the charges which reasonable men could make, courts, in actions involving Section 101(a)(5), have exhausted their reviewing function. Procedural "due process" requires no more.

C. Application of the Appropriate Standard of Review To the Facts of the Instant Case

It is respectfully submitted that, whether the evidentiary test is formulated as: (1) it is a denial of due process to take action on charges "unsupported by any evidence";⁴⁰ (2) "implicit in the requirement of a full and fair hearing is the requirement that there be some evidence to support the charges made";⁴¹ or (3) "a close reading of the record is justified to insure that the findings are not without any foundation in the evidence,"⁴² the evidence presented to the trial committee of the Local Lodge was adequate to prove the charges under Article XII(1) of the By-laws and Article XIII, Section 1 of the Constitution of Subordinate Lodges. Indeed, it is our view that the evi-

⁴⁰ *Lewis, supra*, 407 F. 2d at 1194.

⁴¹ *Id.* at 1195.

⁴² *Ibid.*

dence on both charges would satisfy even the "substantial evidence on the record considered as a whole" test imposed by specific statutory provision on the National Labor Relations Board by the Congress.

The pertinent language of Article XII(1) of the Bylaws reads as follows: "It shall be a violation of these Bylaws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office."

The undisputed evidence submitted to the Local Lodge trial committee was that Hardeman engaged in a physical assault upon business manager Wise for the purpose of effecting referral to employment by said business manager. Hardeman chose this method despite the existence of a joint labor-management referral committee whose function was to consider complaints by applicants for referral that the referral system was not being administered according to the contract or in a fair and equal manner (see Pl. Ex. 18; Tr. 404). Hardeman also could have filed a charge within the union against the business manager (see D. Ex. 5 (Int'l. Lodge Const., Art. V, Sec. 2-3), pp. 19 *et seq.*).

Hardeman testified that on October 1, 1960, he went to see a contractor named Leo Bonner who agreed to send a request to Wise that Hardeman be referred to him for employment (A. 48-49, 53-54). Hardeman testified that he went to the union hall on October 3 and told Wise about talking to Bonner and that Wise had a telegram from Bonner asking for Hardeman and that Hardeman was ready to go to work. Wise said he didn't know if he would send Hardeman or not. (A. 49.) Hardeman and Wise testified that Hardeman then threatened Wise with violence ("going around and around") if Hardeman didn't get the referral (A. 48, 49, 54). Hardeman further testified: "I went to the hall

Wednesday, October 5th, and waited from the time the hall opened until we had the trouble. I tried to make up my mind what to do, whether to sue the local⁴³ or Wise or beat hell out of Wise, and then I made up my mind." (A. 49-50.) Hardeman sat down in the union hall and waited for Wise to come out of the office. When he did, Hardeman showed Wise a copy of a telegram from Bonner requesting the referral of Wise. (A. 50, 53.) After Hardeman handed the telegram to Wise, Hardeman hit Wise in the face (A. 43, 45). Union member Bullock testified that after the fight stopped, "Brother Hardeman was talking to the business manager in a loud tone of voice, saying something to this effect: 'Let this be a lesson to you, Wise, and don't jump me anymore on the work list.' " (A. 55.)

It would seem clear that the purpose of the bylaw which was the subject of the written charge was to deter the use of force and violence to affect the administration of union duties by union officers. If the "some evidence" rule is applied to these facts, there would appear to be no basis for a reviewing court to question the adequacy of the proof on which the finding of guilt was premised.

The federal district judge's charge to the jury is somewhat confusing on this point. The judge said at the conclusion of his charge concerning the lawfulness of the expulsion: "Now, that is all they charged him with were those two sections and there is nothing in this record that would justify a finding of guilty under those sections. All of it is about the fight." (A. 38.) At an earlier part of his charge, there seems to be a grudging admission that there were facts to support the finding of guilt under Article XII(1) of the Bylaws (A. 37):

"Now there may be, and I am not ruling on it one way or the other but I will say this that there is evi-

⁴³ presumably by filing a charge with the National Labor Relations Board, a procedure with which Hardeman apparently was familiar (Tr. 152).

dence in here which might support a finding of guilty under Section 1 of Article 12 of the Subordinate Lodge Bylaws, . . . ”⁴⁴

It is respectfully submitted that there is nothing in the federal district court's charge to the jury with respect to the evaluation of the evidence which would justify the conclusion that there was not some evidence to support the charge with respect to the Bylaws of the Local Lodge.

The *per curiam* opinion of the Court of Appeals assumed that this was the “exact factual situation” which had existed in the *Braswell* case and that the decision in the *Braswell* case was “dispositive of [the] issues” in this case (A. 67). The essential difference between the *Braswell* case and the *Hardeman* case is that the Court of Appeals interpreted *Braswell*'s conduct as merely a blow struck in anger. *Braswell* was not seeking referral and, according to the Court of Appeals, was apparently not seeking to affect the administration of the referral system. *Hardeman*, on the other hand, clearly intended to affect the administration

⁴⁴ Assuming the District Court here conceded the adequacy of evidence to support a finding of guilty under Article XII(1) of the Bylaws, its reliance (A. 37) upon a general verdict theory to upset the union discipline was erroneous. In the first place, it is clear that the union returned a special verdict when it found *Hardeman* “guilty as charged” (see D. Ex. 5 (Sub. Lodge Const., Art. XIV, Sec. 2(d)), pp. 98-99). In any event, there is no requirement that a special verdict be returned in union disciplinary proceedings. *Burke v. Boilermakers*, 302 F. Supp. 1345, 1352 (S.D. Calif. 1968), *aff'd per curiam*, 417 F. 2d 1063 (9th Cir. 1969). And, while *punishment* was not specified as to *each* provision, the accepted rule, even in criminal cases, has been that “the judgment must be sustained if either one of the two counts is sufficient to support it.” *Classen v. United States*, 142 U.S. 140, 146 (criminal proceeding); *Burke v. Boilermakers*, *supra*, at 1352, 1354; see *St. Louis Southwestern Ry. Co. of Texas v. Thompson*, 102 Tex. 89, 98 (1908). In the instant case, expulsion was an allowable union action for violation of *either* provision. D. Ex. 4 (A. 62), D. Ex. 5 (Sub. Lodge Const., Art. XIV, Sec. 2(e) (p. 99), Art. XVI, Sec. 4 (p. 110)) (Bylaw Provision); D. Ex. 5 (A. 63) (Constitutional Provision).

of the union referral system when he struck his blows. It is clear that he was trying to make up his mind as to whether to use legal procedures or to secure more immediate relief by violence. According to Bullock's testimony, *supra* p. 25, it is apparent that Hardeman expected a future benefit from his application of violence to Wise's person.

The pertinent language of Article XIII, Section 1 of the Subordinate Lodge Constitution which was also made a subject of the written charges provides that:

"Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Lodge; . . . shall upon conviction thereof be punished by expulsion from the International Brotherhood."

We have sought to show, *supra*, that the proper standard of judicial review of union interpretations is to refrain from judicial intervention unless the interpretation given by the union body is arbitrary and unreasonable. If such standard is applied to the facts in this case, it should be plainly evident that utilization of physical force as a method of securing change in the administration of the union referral system by its business manager is not consistent with the interest and harmony of the Lodge and does provoke dissension. At the very least, if the violence were to go unpunished it would constitute a bellwether for those in the union who might think they could employ the doctrine more successfully in their own interests.

It is respectfully submitted that, even under the erroneous strict construction rule of the Court of Appeals in the *Braswell* case, there is adequate evidence in the *Hardeman* case to prove a violation of the provisions of Article XIII, Section 1 of the Constitution of Subordinate Lodges. The Court of Appeals stated that "Article XIII, Section 1 of the Constitution on its face is directed at threats to the union as an organization and to the effective carrying out of the union's aims." It further stated that "Braswell's

fist was not such a threat. And that we find that the act charged to Braswell was a blow struck in anger, and nothing more." (A. 78-79.)

The ruling of this Court in *Radio Officers Union v. NLRB*, 347 U.S. 17, on a related issue arising under the National Labor Relations Act is instructive. This Court referred to its rulings in *Republic Aviation v. NLRB*, 324 U.S. 793, and similar cases under the Wagner Act as follows:

"In these cases we but restated a rule familiar to the law and followed by all fact finding tribunals—that it is permissible to draw on experience in factual inquiries." 347 U.S. at 49.

The Court then gave consideration to the effect of the language with respect to "substantial evidence on the record considered as a whole" and its decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474. The Court stated:

"There is nothing in the language of the amendment itself that suggests denial to the Board of power to draw reasonable inferences. It is inconceivable that the authors of the reports intended such a result, for a fact finding body must have some power to decide which inferences to draw and which to reject. We therefore conclude that insofar as the power to draw reasonable inferences is concerned Taft-Hartley did not alter prior law."

It is respectfully submitted that, if an administrative agency such as the National Labor Relations Board operating under explicit statutory judicial review provisions may draw upon common experience to make reasonable inferences, *a fortiori*, a union trial body should have power to do so.

Violence provokes dissension⁴⁵ and works against the

⁴⁵ The National Commission on the Causes and Prevention of Violence has pointed out that both group and individual violence has had a divisive effect, jeopardizing precious institutions such as

(Continued)

interests and harmony of the Subordinate Lodge. Thus, all five members who were present in the union hall at the altercation immediately became involved on opposite sides in Hardeman's dispute with Wise. It is reasonable to infer that the assault on the principal officer of the local union in connection with the performance of his official duties would tend to polarize sentiment and attitudes within the local. The union's determination that there was "dissension" in its view of the term created by Hardeman's attack is supported by the facts.

Certainly if the violence went unpunished a dangerous trend would develop in the methods used within the Local Lodge to resolve the grievances of the members and there would be a consequent weakening of the union's ability to function in a peaceful and orderly manner. This would work against the "interest and harmony" of the Subordinate Lodge.

For the reasons stated above, it is respectfully submitted that the determination of the union satisfies the applicable tests of the courts.

D. Conclusion

This case has presented much more than a technical issue as to the quantum of evidence required to support a union

schools and universities "poisoning the spirit of trust and cooperation that is essential to their proper functioning" and "corroding the central political processes of our democratic society—substituting force and fear for argument and accommodation." *Final Report of the National Commission on the Causes and Prevention of Violence*, page xv (1969). Similarly, the use of violence in the form of a physical attack upon a union official has divisive effects among union memberships and encourages the use of force to effectuate changes in the administration of the tasks of a labor union in lieu of resort to the established peaceful internal processes of filing and processing charges of maladministration on the part of the union or filing claims with the contractually established joint referral committees whose function is to police the referral system.

disciplinary determination. The court below in this case exercised a scope of review of workingmen's internal proceedings and determinations of such breadth as to substitute its judgment for that of their tribunal. For the judiciary to engage in that kind of review under Section 101(a)(5) is impermissible. Congress has made it clear that the judiciary under Section 101(a)(5) is not to demand of workingmen a standard of performance they may not fairly be expected to meet. Congress has also made it clear that union self-government is important to the country and to the country's labor relations. Judicial review so stringent as to demand so meticulous a performance by union tribunals as to match the best performance of the federal trial judges makes impossible the internal self-regulation which Congress was careful to preserve in enacting the Labor-Management Reporting and Disclosure Act and will, thus, destroy workingmen's attempts to provide their own forms of justice. The destruction of institutions established by trade union groups which are essential for their self-government also has adverse implications for the stability of collective bargaining relations.

II

The National Labor Relations Act preempts an action brought under Section 102 of the Labor-Management Reporting and Disclosure Act wherein a former union member, claiming wrongful expulsion, does not seek restoration of membership rights but the crux of the action is a claim for damages for an alleged loss of employment due to the union's alleged failure to refer him to employers.

A. The Union Conduct Involved in This Case Is Conduct Which Was Clearly Prohibited or Protected by the N.L.R.A.

The crux of this litigation as this case was tried was the failure or refusal of the union through its hiring hall to refer Hardeman to jobs. Hardeman never sought restora-

tion of membership. He did seek damages. The evidence adduced by Hardeman basically related to the refusal of the union to refer him to jobs which he claimed was due to the fact that he was not a union member (A. 17-20; Tr. 125-127). Thus, his proof of damages was devoted to job or employment rights. Neither in his complaint nor at any stage of the proceeding did he seek reinstatement to union membership and, while he referred in his complaint to loss of retirement and insurance benefits, he introduced no evidence in connection therewith.

The union conduct involved in this case involving refusals to refer respondent through the union hiring hall is either protected or prohibited under the National Labor Relations Act, as amended.⁴⁶ Discriminatory refusals by a union to refer through a hiring hall have long been held by the National Labor Relations Board to constitute violations of Sections 8(b)(2) and 8(b)(1)(A). *A. Cestone Co., et al.*, 118 NLRB 669 (1957), *enf'd.*, 254 F. 2d 958 (2nd Cir. 1958); *Local 138, International Union of Operating Engineers v. NLRB*, 321 F. 2d 130 (2nd Cir. 1963) (enforcing in part and remanding in part 139 NLRB 633); *NLRB v. Penobscot Bay Longshoremen's Local 1519*, 310 F. 2d 689 (1st Cir. 1962) (enforcing 136 NLRB 724); *NLRB v. Hod Carriers*, 392 F. 2d 581 (9th Cir. 1968) (enforcing 145 NLRB 1674 and 159 NLRB 1128); *NLRB v. United Brotherhood of Carpenters*, 369 F. 2d 684 (9th Cir. 1966) (enforcing 152 NLRB 629); *Lummus Company v. NLRB*, 339 F. 2d 728 (D.C. Cir. 1964) (enforcing in part 142 NLRB 517).

In *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 694, this Court pointed out that a refusal to refer because of an actual or believed failure to comply with internal union rules and a resulting

⁴⁶ The statutory provisions involved—Sections 8(b)(2), 8(a)(3), 8(b)(1)(A) and 7—are set forth, in pertinent part, in the appendix of this brief.

inability to obtain employment is arguably a violation of Sections 8(b)(2) and 8(b)(1)(A).

This Court also pointed out in *Borden* that the Board might find in its appraisal of conflicting testimony that a refusal to refer was due only to the failure of the alleged discriminatee to comply with valid hiring hall rules and the union conduct would then constitute protected union activity within the meaning of Section 7 (373 U.S. at 695). See *Local 357, International Brotherhood of Teamsters v. National Labor Relations Board*, 365 U.S. 667; *United Association of Journeymen, etc.*, 159 NLRB 1119 (1966); *Pacific Maritime Association*, 155 NLRB 1231 (1965); *Local 1338, International Longshoremen's Association*, 179 NLRB No. 67 (1969), 72 LRRM 1369; *United Association of Journeymen, etc.*, 176 NLRB No. 50 (1969), 71 LRRM 1253.

Thus, Hardeman testified that he was continuously on the out-of-work list (A. 19). Herman Wise, business manager of Local Lodge 112, testified, on the other hand, that Hardeman did not keep himself on the out-of-work list as required under the rules of the hiring hall regarding job referrals (A. 29-33; D. Ex. 3 (A. 61)).

In any event, the conduct upon which this case was centered was conduct which was either protected or prohibited by the Act and surely at least arguably so.

B. Neither State Courts nor Federal Courts Have Jurisdiction to Regulate Conduct Clearly or Arguably either Protected or Prohibited by the Act

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, this Court held that, when "an activity is arguably subject to § 7 or § 8 of the Act, the state as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." Here the union's conduct which was presumably found by the jury to have caused a loss of employment and earnings was its refusal or failure to refer Hardeman to jobs through the

hiring hall arguably in violation of Sections 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act. Hence, the exercise of jurisdiction by the federal district court in the instant case was in error for the *Garmon* principle governs here.

In *Garmon*, this Court emphasized that the fundamental objective was to eliminate "potential conflicts" which the exercise of state jurisdiction might cause "with a complete and inter-related federal scheme of law, remedy, and administration" (359 U.S. at 242, 243).

The *Garmon* standard has been repeatedly followed in subsequent cases. *Longshoremen v. Ariadne Co.*, 397 U.S. 195; *Hattiesburg Building and Trades Council v. Broome Co.*, 377 U.S. 126; *Liner v. Jafco, Inc.*, 375 U.S. 301; *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690; *Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union, et al. v. Jacob Perko*, 373 U.S. 701; *Construction Laborers v. Curry*, 371 U.S. 542; *Ex parte George*, 371 U.S. 72; *Marine Engineers v. Interlake Co.*, 370 U.S. 173; *Devries v. Baumgartner's Electric Construction Co.*, 359 U.S. 498; *Plumbers' Union v. County of Door*, 359 U.S. 354.

The Court below in *Braswell* referred (A. 73) to *International Association of Machinists v. Golzales*, 356 U.S. 617. There a union member had prevailed in a state court suit for restoration of membership and damages due to his illegal expulsion. This Court found that the state court litigation involved a breach of contract governing Gonzales and his union and "did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8(b)(2)" (356 U.S. at 621-622). The Court held that under such circumstances the state court, having power to issue an order requiring Gonzales reinstated to membership, also had jurisdiction to "fill out" the remedy of rein-

statement by awarding him damages for loss of employment.⁴⁷

Borden, supra, like this case, involved a hiring hall and a union's refusal of a job referral to the complainant. The refusal there was because the complainant member had sought work directly instead of through the union hiring hall. Suit was brought in a state court seeking damages for the refusal to refer. Borden claimed that the union defendants were guilty of a malicious and discriminatory interference with his right to contract and also among other things that "defendants had breached a promise, implicit in the membership arrangement, not to discriminate unfairly or to deny any member the right to work." 373 U.S. at 692. This Court found the state court suit preempted, stating (at 694):

"The facts as alleged in the complaint, and as found by the jury, are that the Dallas union business agent, with the ultimate approval of the local union itself, refused to refer the respondent to a particular job for which he had been sought, and that this refusal resulted in an inability to obtain the employment. Notwithstanding the state court's contrary view, if it is assumed that the refusal *and the resulting inability to obtain employment* were in some way based on respondent's actual or believed failure to comply with internal union rules, it is certainly 'arguable' that the Union's conduct violated § 8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and § 8(b)(2), by causing an employer to discriminate against Borden in violation of § 8 (a)(3)." (Emphasis in original.)

The Court also pointed out, as stated above, that there was a possibility that the union conduct was protected concerted activity within the meaning of Section 7 of the Act.

⁴⁷ In *Garmon*, the Court cited *Gonzales* as an exception to the preemption principle because the activities there regulated were of "merely peripheral concern of the National Labor Relations Act." *Garmon, supra*, 359 U.S. at 243.

The Court went on to say that, "The problems inherent in the operation of union hiring halls are difficult and complex, * * *, and point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency. *Borden, supra*, 373 U.S. at 695.

Borden and Perko, supra, 373 U.S. 702, placed *Gonzales* in its true perspective. In *Borden*, the Court distinguished *Gonzales*. The Court said (373 U.S. at 697):

"The *Gonzales* decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and *that the principal relief sought was restoration of union membership rights*. In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied." (Emphasis supplied.)

The Court went on to say (*id.* at 697-698):

"The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action * * * concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction.

"Nor do we regard it as significant that Borden's complaint against the union sounded in contract as well as in tort. It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. * * * In the present case, the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards."

In *Perko, supra*, a companion case to *Garmon*, the pre-

emption principles of *Garmon* were held by this Court to bar a state court suit for damages for the past and future loss of earnings where the complainant member asserted that the union had wrongfully interfered with his right to continue working as a foreman and thereby caused his discharge. This Court again found *Gonzales* inapplicable and said, "As in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters." 373 U.S. at 705.⁴⁸

Here, the conduct alleged to have been engaged in by the union, which was respondent's real concern, was as in *Borden*, the refusal of the union to refer him to jobs. Harde- man claimed that the union's refusal to refer resulted in his inability to obtain employment. It was that conduct for which damages were sought. Hardeman was quite uncon- cerned with union membership. Rather he sought a sum of money based on a theory of lifetime unemployment which he attributed to the refusal of the union to refer him to jobs through its hiring hall. Such conduct is, of course, arguably subject to the prohibitions of Sections 8(b)(2) and 8(b)(1) (A) of the Act or is arguably protected by Section 7 of the Act. That is the type of conduct which was the subject mat- ter of the lawsuit in *Borden* where this Court held such con- duct was arguably prohibited or protected by the Act.

⁴⁸ Whether *Gonzales* has any vitality in the light of this Court's decisions in *Borden* and *Perko* is open to question. *Day v. North- west Division* 1055 et al., 238 Ore. 624, 389 P. 2d 42 (1964), cert. denied, 379 U.S. 874. The court below apparently viewed the instant case as not arguably subject to the jurisdiction of the Board be- cause, in their view, the dispute was "solely between a member and his union and [did] not directly concern rights [under] the NLRA" citing *Gonzales* (A. 73). Since *Gonzales* was predicated upon state power over restoration of union membership and Harde- man did not seek such relief the dispute centered about employ- ment rights rather than membership rights and *Gonzales* is in- apposite.

The so-called "Bill of Rights," of which Section 101(a)(5) is a part, refers to the rights of membership. The Labor-Management Reporting and Disclosure Act deals with the relationship between a member and his union, not with a member's employment relations.

Suits brought under Section 102 to enforce the bill of rights are suits to enforce a federal statutory right. To the extent that a suit brought under Section 102 deals with membership rights, such a suit is not preempted by the National Labor Relations Act. Thus, in a suit which seeks reinstatement to membership for a wrongful expulsion or suspension, there is no preemption by the National Labor Relations Act. In such a suit collateral relief in the form of consequential damages up to the date of restoration of membership or an offer to restore membership may be awarded. Membership, the statutory right comprehended by Congress, is not the aim of this suit. This Congressional objective is not pursued here and the subject matter of the suit simply does not come within the ambit of the "bill of rights." Hence, where, as here, the suit involved focuses "principally, if not entirely, on the union's actions with respect to Borden's [Hardeman's] efforts to obtain employment" (373 U.S. at 697), the National Labor Relations Act preempts." Here, as in *Borden*, "no specific equitable relief is sought directed to Borden's [Hardeman's] status in the union" and, thus, there is no federal remedy " 'to fill out' by permitting the award of consequential damages." (373 U.S. at 697.) The "crux" of the action here concerns Hardeman's employment relations and involves conduct arguably subject to the National Labor Relations Board's jurisdiction.

In the case at bar, as in *Borden*, "It is not the label affixed to the cause of action" that controls (*Id.* at 698). And in this case, as in *Borden*, "... the conduct on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by

the federal agency vested with exclusive primary jurisdiction to apply federal standards" (*Id.* at 698).

The court below incorporated by reference its opinion in *Braswell* as "dispositive" of the so-called preemption issue (A. 67). *Braswell* viewed the *Garmon* rule as limited to conflicts between federal and state policy (A. 72). This Court has held, however, that the preemption doctrine applies to federal courts as well as state courts. *Garmon*, *supra*, 359 U.S. at 265; *Vaca v. Sipes*, 386 U.S. 171, 179.

The rationale of preemption applies to federal courts as well as to state courts. The reasoning underlying the preemption doctrine is pertinent to support primary jurisdiction as an integral part of the dominant statutory objective of channeling through the National Labor Relations Board conduct over which that agency has cognizance. The original predicate of the preemption of state action was that not even a federal court could act in a dispute cognizable by the Board. In *Garmon*, this Court stated that "when an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." (359 U.S. at 245) (emphasis supplied). *Garner v. Teamsters Union*, 346 U.S. 485, preceded *Garmon*. And, in *Garner*, this Court said, "The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so" (346 U.S. at 491). See also *Weber v. Anheuser Busch, Inc.*, 348 U.S. 468, 479 and n. 8. Action by a federal court, no less than by any other tribunal, creates "potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, . . . of inconsistent standards of substantive law and differing remedial schemes" *Garmon*, *supra*, 359 U.S. at 242.

Whether, therefore, the issue in this case is viewed technically as "preemption" or as one of primary exclusive jurisdiction as between two federal tribunals, the National

Labor Relations Board has exclusive jurisdiction because, in the kind of circumstances presented in the case at bar, Congress intended that result for the same reasons which underlie both doctrines.

In substance, *Hardeman* seeks to recover money damages for the commission of an unfair labor practice. That the federal courts have no jurisdiction to undertake such an assignment has long been settled. Unless Title I of the Landrum-Griffin Act has had the effect of clothing each of the several hundred district court judges of the country with the powers over unfair labor practices vested in the National Labor Relations Board, the federal district courts are without jurisdiction in cases of this kind. See *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183 (4th Cir. 1948); *Amalgamated Association v. Dixie Motor Coach Corp.*, 170 F. 2d 902 (9th Cir. 1948); *Born v. Laube*, 213 F. 2d 407 (9th Cir. 1954), *cert. denied*, 348 U.S. 855. In *Amazon Cotton Mill Company*, *supra*, 167 F. 2d at 186, the court pointed out that the history of the National Labor Relations Act and the decisions rendered thereunder demonstrate,

“that the purpose of that act was to ‘establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining’; that the only rights made enforceable by the Act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined. H. Rep. No. 447, 74th Cong. 1st Sess. p. 24; S. Rep. No. 573, 74th Cong. 1st Sess. p. 15; *Aguilines, Inc. v. N.L.R.B.*, 5 Cir. 87 F. 2d 146, 150, 151; *Blankenship v. Kurfman*, 7 Cir. 96 F. 2d 450; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638; *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 58, 58 S. Ct. 466, 82 L. Ed. 646; *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265, 266, 60 S. Ct. 561, 84 L.

Ed. 738; *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 362, 365, 60 S. Ct. 569, 84 L. Ed. 799."

C. *The Bill of Rights, Title I of the LMRDA, Was Not Intended to Establish a Duplicate System For Administering Sections 8(b)(2), 8(b)(1)(A), 8(a)(3) or 7 of the National Labor Relations Act.*

Nothing in Title I of the Labor-Management Reporting and Disclosure Act demonstrates any intention on the part of Congress to change the method by which unfair labor practices are dealt with under the National Labor Relations Act and to vest the district courts with jurisdiction of such matters.

The Labor-Management Reporting and Disclosure Act represents the first major Congressional effort toward regulation of the internal affairs of unions. *NLRB v. Allis-Chalmers*, 388 U.S. 175 at 193. Section 101 (29 U.S.C. 411) deals specifically with the relationship between union members and their union. Congress established certain membership rights which a union may not deny. But these rights are membership rights not employment rights. The statutory text speaks in terms of "no member" or "any member."⁴⁹ Section 101(a)(5), which was the section under which Hardeman cloaked his claim, provides:

"Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

⁴⁹ See *Tomko v. Hilbert*, 288 F. 2d 625, 627 (3d Cir. 1961), where the court said:

"A recapitulation of other pertinent provisions of the LMRDA clearly shows that its operation is narrowly focused on protecting the union-member relationship."

This section clearly speaks in terms of membership. The intent obviously was to enable a wrongfully expelled member to regain his membership, an objective which Hardeman forswore.

The court below in *Braswell* regarded Section 102 (29 U.S. 412)⁵⁰ as a grant of jurisdiction evidencing "congressional intent to confer jurisdiction on the federal courts to award damages for actions—even if these actions were arguably violations of the NLRA and within the jurisdiction of the NLRB . . ." (A. 73).

The mere fact that the federal courts are vested with jurisdiction to enforce the bill of rights, however, sheds no light on the question as to whether the federal courts in exercising that jurisdiction may regulate conduct normally subject to the exclusive primary jurisdiction of the National Labor Relations Board.

Section 103⁵¹ and its legislative history indicates that the Congress was concerned with preserving the rights and remedies of union members under pre-existing federal and state law. Section 103 does not deal with the converse situation, namely where another federal law might be said to limit Title I rights. Thus, Senator Kennedy, when Senator

⁵⁰ Section 102 provides:

"Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

⁵¹ Section 103 provides:

"Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization."

McClellan presented his Bill of Rights on the Senate floor, voiced the objection that:

“[I]f the proposal were enacted, the present rather exhaustive remedies under the common law of various states might be wiped out, and only the rights suggested by the Senator from Arkansas would then be available to union members.⁵²

Senator Kuchel characterized Senator Kennedy's argument as, “The argument that the amendment of the Senator from Arkansas might be interpreted as preempting the field.”⁵³ Senator Kennedy later said, “Unless there were some changes in the doctrine of preemption, the present very adequate provisions of state law which protect members would be preempted.”⁵⁴

When Senator Kuchel introduced his version of the bill of rights, which was ultimately substituted for the McClellan proposal, it included Section 103 which, insofar as it referred to state and federal law, was identical to Section 103 of the Act.⁵⁵ Senator Kuchel said in connection therewith,

“I thought the first point the able Senator from Massachusetts made was a valid one. He raised the question whether, if a Federal bill of rights for Labor were adopted, it would put at naught all State laws in the country protecting the working men.

“I arose, and interrupted my friend, the Senator from Massachusetts. I asked him whether he would yield. He did yield.

⁵² 105 Cong. Rec. 5816 (daily ed. April 22, 1959), II *Leg. Hist.* 1108.

⁵³ *Id.*

⁵⁴ *Id.* at 5817, *Id.* at 1109.

⁵⁵ Section 103 of the Kuchel Substitute provided:

“Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal.”

"I then asked my friend, the Senator from Arkansas, whether he would be willing to meet the valid argument of preemption, by offering to the amendment an appropriate nonpreemption amendment. After some discussion, the able Senator from Arkansas said he would; he did so, and the Senate approved it."⁵⁶

Similarly, Senator Goldwater's statement following passage of the Act, referring to Section 103, used "preemption" in the sense of the LMRDA not preempting pre-existing law:

"Section 103 preserves any other rights and remedies which a union member may have under any other State or Federal law, or before any other court or agency, or under any union constitution or bylaws. It thus guards against the application of the preemption problem in connection with the newly granted bill of rights, and preserves any broader safeguards for union members which may be contained in some union constitutions or bylaws."⁵⁷

This provision clearly safeguards the body of state and federal law which existed prior to the adoption of the bill of rights against preemption by Title I. And that is all that it does. It may fairly be said, therefore, that the body of preexisting law, relating to the exclusive primary jurisdiction of the National Labor Relations Board was left intact by Congress. In other words, no change was made in preexisting preemption doctrines. See *Rinker v. Local 24, Lithographers*, 201 F. Supp. 204 (W.D. Pa. 1962). It would appear, then, that the jurisdiction of federal courts, at least in cases where restoration of membership rights is not sought under the LMRDA, is preempted to the extent that such jurisdiction was preempted under the National Labor Relations Act prior to the enactment of Title I.

Moreover, Section 603(b) (29 U.S.C. § 523) of the LMRDA expressly provides that nothing contained in Title

⁵⁶ *Id.* at 6020, *Id.* at 1229.

⁵⁷ 105 Cong. Rec. 19759 (Sept. 14, 1969), II *Leg. Hist.* 1845.

I "impairs or otherwise affects the rights of any 'person' under the National Labor Relations Act, as amended."⁵⁸ A labor organization is such a person, as defined in both Acts,⁵⁹ and union activity in the lawful operation of hiring halls is protected activity and is, therefore, a "right" under the NLRA. And this express reference to the NLRA reinforces the conclusion that that Act's application to conduct committed to exclusive primary regulation by the Board continues operative after the enactment of Title I and that Congress did not intend to leave issues involving the complex problems of hiring hall discrimination to determinations by jury trial in the federal district courts.

This case deals, as stated above, with employment rights rather than with membership rights. It has been held that the doctrine of preemption or exclusive primary jurisdiction must be determined on the basis of an employment rights-membership rights dichotomy. Thus, the Pennsylvania Supreme Court in *Spica v. International Ladies' Garment Workers Union*, 420 Pa. 427, 218 Atl. 2d 579 (1966), held that where an individual claimed wrongful removal from membership, and that as a result thereof her employment as a union officer ended and she was deprived of future opportunities for employment, the complaint must be dis-

⁵⁸ Section 603(b) provides in full:

"Nothing contained in titles I, II, III, IV, V, or VI of this Act shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act, as amended, or any of the obligations, rights, benefits, privileges, or immunities of any carrier, employee, organization, representative, or person subject thereto; nor shall anything contained in said titles (except section 505) of this Act be construed to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."

⁵⁹ Section 3(d) of the LMRDA (29 U.S.C. § 402(d)); Section 2(1) of the NLRA, as amended (29 U.S.C. § 152(1)).

missed because the matter was one arguably subject to the jurisdiction of the National Labor Relations Board. The court said (420 Pa. at 430):

"However, it is unnecessary to dwell at length on this weakness in the plaintiff's case because her Amended Complaint clearly reveals that she has chosen the wrong jurisdiction in which to pursue her remedies. She asserts that, as a direct result of her expulsion as business agent and as member of the ILGWU, 'she has been deprived of her right to work in those places of employment in the industry, subject to the agreements between the ILGWU and its employers' association, and such deprivation of the value of \$25,000.' It is thus obvious that the heart of her complaint is the injury done to her employment relationship."

The court, finding that because of the provisions of Sections 8(b)(2) and 8(a)(3) of the National Labor Relations Act the case was arguably subject to the Board's jurisdiction, dismissed the complaint.

Some federal courts have also considered that the application of preemption or primary exclusive jurisdiction to Section 101(a)(5) suits must be determined on the basis of an employment rights-membership rights dichotomy. *Barunica v. Hatters Local 55*, 321 F. 2d 764, 766 (8th Cir. 1963); see also *Green v. Local 705, Hotel and Restaurant Employees*, 220 F. Supp. 505 (E.D. Mich. 1963); *Forline v. Helpers Local No. 42, International Association of Marble Polishers*, 211 F. Supp. 315, 318 (E.D. Pa. 1962).

Finally, Congress, which in the federal regulatory scheme, took care to safeguard the rights of employees to refrain from joining unions (Section 7 of the NLRA), should not, in the absence of a clear intention to the contrary, be considered to have afforded union members greater rights and remedies against discriminatory operation of hiring halls than it afforded non-members. Section 101(a)(5) protects only union members. Section 8(b) extends equal protection

to members and non-members. If Hardeman is correct, union members may bring suits in federal courts for damages, both past and prospective, without seeking restoration of membership, while non-members may obtain from the NLRB only reinstatement and back pay.⁶⁰

For the foregoing reasons, it is apparent that Congress did not intend to establish a duplicate system for enforcing the National Labor Relations Act in suits brought under Title I of the LMRDA.⁶⁰

⁶⁰ The cases cited by the court below in *Braswell* (A. 73-74) do not deal with the issues in the case at bar. In none of them did the plaintiff abjure the reinstatement of his membership and seek only damages for past and future alleged interference with employment opportunities.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded with direction to dismiss this action.

Respectfully submitted,

JOHN J. BLAKE
570 New Brotherhood Building
Kansas City, Kansas 66101

LOUIS SHERMAN
ELIHU I. LEIFER
1200 15th Street, N.W.
Washington, D. C. 20005

BERNARD CUSHMAN
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorneys for Petitioner

Of Counsel:

SHERMAN, DUNN & COHEN
Washington, D. C.

APPENDIX**OTHER STATUTORY PROVISIONS INVOLVED****Labor-Management Reporting and Disclosure Act
(73 Stat. 523)**

Section 101(b), 29 U.S.C. § 411(b), provides:

“Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.”

Section 103, 29 U.S.C. § 413, provides:

“Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.”

Section 603, 29 U.S.C. § 523, provides:

“(a) Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

“(b) Nothing contained in titles I, II, III, IV, V, or VI of this Act shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act, as amended, or any of the obligations, rights, benefits, privileges, or immunities of any carrier, employee, organization, representative, or person subject thereto; nor shall anything contained in said titles (except Section 505) of this Act be construed to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended.”

National Labor Relations Act, as Amended (49 Stat. 449)

Section 7, 29 U.S.C. § 157, provides:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).”

Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), provides:

“(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.”

Section 8(b)(2), 29 U.S.C. § 158(b)(2), provides:

“(b) It shall be an unfair labor practice for a labor organization or its agents—(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.”

Section 8(a)(3), 29 U.S.C. § 158(a)(3), provides:

“(a) It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement

with a labor organization *** to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, ***: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization *** (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

i
INDEX

Statement of the case	1
Summary of Argument	2
Argument	6
I. The Court below applied a Standard of Review consistent with the intent of Congress and conforming with the Standard of Review applied by other Circuit Courts of Appeal.	6
A. Application of the Appropriate Standard of Review to the facts of the in- case.	10
II. The National Labor Relations Act does not preempt an action brought under Section 102 of the Labor Management Reporting and Disclosure Act wherein a former Union Member, claiming wrongful expulsion, does not seek restoration of membership rights but claims damages for alleged loss of employment is a consequence of his wrongful expulsion.	15
III. Significance of this Case	20

AUTHORITIES CITED

Page

Cases

Allen v. International Alliance of Theatrical, State Employees, et al., 338 F. 2d. 309 (5th Cir. 1964)	9
Braswell v. International Brotherhood of Boilermakers, 388 F. 2d. 309 (5th Cir. 1964)	9, 14,
International Association of Machinist v. Gonzalez, 356 U.S. 617, 78 S. Ct. 923, 2 L. Ed. 2d. 1018 (1958)	16
Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union, et. al. v. Perko, 373 U.S. 701, 10. L. Ed. 2d. 646 (1963)	15
Local 1625 Retail Clerk's International Association v. Schermerhorn, 375 U.S. 96, 94 S. Ct. 219, 11 Ed. 2d. 179 (1963)	17, 20
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	15
Simmons v. Avisco, Local 713, 350 F. 2d. 1012. (1965)	9

Statutes

Labor Management Reporting and Disclosure Act (73 Stat. 523, 29 U.S.C. s.s. 411, et. seq.):	
Section 101 (a) (5)	3, 6, 7, 8
29 U.S.C. sec. 411 (5)	10, 17
29 U.S.C.A. sec. 412	5, 18, 19

Union Provisions

UNION PROVISIONS	19
-------------------------------	-----------

Subordinate Lodge Constitution

Article XIII, Section 1	1, 11, 13, 14
-------------------------------	---------------

Subordinate Lodge By-Laws

Article XII, Section 1	11, 12, 14
------------------------------	------------

IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 123

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO, *Petitioner*

v.

GEORGE W. HARDEMAN, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Respondent adopts the statement of the case as set forth by the petitioner but adds the following thereto:

On Page 6 of Petitioner's Brief, petitioner states that the trial committee found Hardeman to be guilty as charged. That the trial committee's determination of guilty as charged was sustained by a vote of the members which voted by secret ballot to expel Hardeman indefinitely.

No evidence was taken by the local lodge and the local lodge vote amounted to purely a political motion since they did not hear the evidence. The expulsion vote was entirely unnecessary since one of the charges, Article 13, Section 1¹, carried with it automatic expulsion upon finding of of guilt.

Petitioner further states on Page 7 of its brief that Hardeman only signed the out of work list twice and job referral rules for employment required unemployed applicants to report and register each month and the rules stated that their name would be removed in the absence of such report and registration. Petitioner omits the evidence of Hardeman to find work in his trade after losing his card, and thereby belittles the relationship of the loss of his card to his ability to find work.

¹ The constitutional provision was Article XIII, Section 1 of the Subordinate Lodge Constitution (D. Ex. 5 (A. 63): Tr. 388), providing:

"Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Brotherhood or of any District or Subordinate Lodge:

cont'd.

Hardeman sought work in many shops and was turned down (Tr. 131). Hardeman further testified that his name continued on the out of work list (Tr. 134). Contrary to Wise's testimony that he only signed the list twice as cited in petitioners statement of fact as if it were uncontroverted evidence. Hardeman had been a long time member of the local and was well acquainted with the rules and regulations and customs of running the out of work list. Therefore his statement that he kept his name on the out of work list was more than enough evidence to justify a jury's finding of fact in this instance.

SUMMARY OF ARGUMENT

The Courts below applied a Standard of Review which was consistent with the intent of Congress and which has been adopted by all of the other Circuit Courts of Appeal.

Petitioner argues legislative intent by random statements from several Congressmen and Senators. All of these men have aspired to National prominence since the passage of the act and it is certain that their statements were made with an eye toward their political consequences.

In addition to this, these several random statements could not be considered to represent the collective intent of a legislative body of 535 individuals. The best way

who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organizations which shall be hostile to the International Brotherhood or to any of its subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood."

to determine legislative intent is the plain meaning of the act when considered in the context of our law at that time.

Respondent submits that the requirements of the act are both substantive as well as procedural. Section 101 (a) (5) (A) requires the accused to be served with written charges and (B) requires that he be given time to prepare his defense. These requirements are procedural.

Section 101 (a) (5) (C) requires that he be given a full and fair hearing. This requirement is substantive, since it gets into the substance of the disciplinary proceeding to determine if the member was given a full and fair hearing.

Petitioner concedes that all of the Circuit Courts of Appeal who have ruled on this question have adopted the "Some Evidence" rule or that there must be some evidence to support the charges of which the accused is found guilty in order to meet the requirements of a "full and fair hearing" as required by Section 101 (a) (5) (C). This is the same test as applied in the instant Hardeman and Braswell case. Therefore Petitioner admits that the ruling in the instant case does not conflict with the other Circuit Courts of Appeal.

However Petitioner argues that the courts have no right to interpret the meaning of Union Constitutions and By-Laws upon which charges are brought. This attacks the ruling of all the Circuit Courts of Appeal since if the Courts can review the evidence taken by Union Trial Boards they must make an interpretation of the charges to compare with the evidence taken in order to apply the "some evidence" rule. Petitioner is attacking the rulings of all of the Circuits from a different point of view.

Respondent further contends that a strict plain meaning interpretation is proper. Other Circuits have applied this rule also. The Act itself requires it since it does require that the accused be served with written specific charges. The intent of Congress is to require that the member who may or may not be barely literate understand what he is accused of. To then hold that a vague or liberal or loose construction of the charge is proper clashes with the key word "specific" as used in the act.

Ultimately Petitioner concludes his argument by arguing the evidence in the case. Since he admits that the Courts below adopted the same doctrines of Law as expounded by the other Circuits he is in effect asking this court to rule on a question of fact rather than the original question of Law he proposed.

Respondent submits that Hardeman was charged and found guilty of 2 charges. One was more serious since the Constitution required his expulsion if he was found guilty of it. If he were only found guilty of the lesser charge, his punishment may not have been so severe but could have amounted to a simple fine. There was absolutely no evidence to support a finding of guilt under the more serious charge. This was the ruling of the Court below and it further ruled that this made the expulsion unlawful. Petitioner's argument does not attack this ruling but emphasizes the possibility of guilt under the lesser charge. The requirement of "Specific Charges" implies a specific finding of guilt.

Respondent further submits that the National Labor Relations Act does not preempt an LMRDA action when loss of wages are a proximate consequence of wrongful discipline. The doctrine of preemption is a judicial rule to prevent conflict of State Law and Federal Law in the field of Labor Law.

It does not apply when Congress legislates a new federal action. Title 29 U.S.C.A. Sec. 412 authorizes a civil action in a District Court for such relief as may be appropriate. Surely any damages suffered as a proximate consequence of wrongful discipline are such "relief as may be appropriate".

The Act is not limited to injunctive relief since it uses the term "civil action" which is traditionally a suit for damages and need not include an injunction. Therefore the plain meaning of the Act rules out the application of the Doctrine of Preemption.

The instant case is highly significant to all who participate in the labor movement in this country. If this case is affirmed it will require the management of Unions to protect the rights of their members as required by LMRDA. If it is reversed it will make the act worthless.

Hardeman could not afford the legal fees of a trial in the District Court for an injunction. He could not afford the Appeal to the 5th Circuit or the proceedings before this Honorable Court. He could not even have paid for the printing of the Legal briefs in this case if he had only sought injunctive relief.

Hardeman is not just an individual. He is "everyman" in the labor movement. His problems are shared by every member of a Trade Union in this Country. They cannot afford injunctive relief and appeals, especially when they are out of work due to being wrongfully deprived of their memberships. Their causes would go unsung and they would have no protection. Their only door to the courtroom is through a civil damage suit.

6
ARGUMENT

I.

THE COURT BELOW APPLIED A STANDARD OF REVIEW CONSISTENT WITH THE INTENT OF CONGRESS AND CONFORMING WITH THE STANDARD OF REVIEW APPLIED BY OTHER CIRCUIT COURTS OF APPEAL.

The AFL-CIO in their brief go far afield and question the legal right of a union tribunal to determine whether or not there is some evidence to support a finding of guilt of charges brought against a member. This question is ridiculous. To so hold would completely emasculate the plain meaning of the words "a full and fair hearing" as required in Section 101 (a) (5) of LMRDA.

Petitioner in its brief refers to this section and contends that the requirements are no more than procedural, citing several sample statements of several senators in arguing his legislative intent. Irregardless of these statements by the several senators the legislative intent is best expressed by the plain meaning of the words of the act itself.

There are one hundred members of the senate and four hundred thirty-five members of the house. To argue the legislative intent of this body of five hundred thirty-five individuals by random statements of a few is certainly not the place to look for the intent of the many who voted in favor of the bill as passed.

I am sure that the intent of each individual, congressman and senator, who cast his vote in approval were many, diverse and varied.

I submit further that the remarks of senators and con-

gressman published in the Congressional Record and other public documents do not necessarily reflect their own individual intent since such statements and publications are necessarily worded with an eye toward their political effect on powerful lobbies and voting groups who opposed the passage of the Landrum-Griffin Act.

This is particularly true when our country's history in the last eleven years has shown us that these men were aspiring to the heights of national prominence at the time they made the remarks quoted by petitioner and the AFL-CIO.

Respondent submits that the best place to look for legislative intent is the language of the act itself and the plain meaning of the words used as interpreted in the administration of the law.

Section 101 (a) (5) of the LMRDA states:

"Safeguards Against Improper Disciplinary Action - No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

Respondent submits that the first two requirements, A & B, are procedural. Respondent further submits that Section C deals with substantive rights. This section gets down to the meat of the coconut and covers a variety of things which deal with substantive rights that are necessary for a full and fair hearing.

Petitioner admits on Page 18 of its brief that the Second, Third, Fifth and Ninth Circuits, which are all of the circuits that have ruled on the question of a full and fair hearing followed the standard of review as followed in *Braswell* and in the instant *Hardeman* case which is, there must be "some evidence" to support a finding of guilt of charges brought against a member of a union in a union disciplinary proceeding. Petitioner cites no case which has ruled to the contrary. Therefore he apparently concludes and concedes that in interpreting Section 101 (a) (5) (C) that the settled law among the Circuit Courts of Appeal recognizes that in order to have a full and fair hearing that there must be "some evidence" to support the charges of which the the accused is found guilty.

He does however attack the interpretation of the District Court and the Fifth Circuit Court of Appeals of the charges made and contends that they had no right to interpret the sections of the constitution with which *Hardeman* was charged.

What is the difference? On the one hand he admits that courts have the right and duty to examine the evidence to see if they conform to the charges but denies the right of the court to examine the charges to see if it conforms to the evidence.

This assertion is ridiculous for one cannot be done without doing the other. They are both the same window but looking through it from opposite sides. Therefore, since these Circuit Courts of Appeal have uniformly established the law to be that a court may examine the evidence to see if there is some evidence to support the charge, then they have also established the principle that a court may interpret the meaning of the charge in order to apply it to the

evidence for the "some evidence" test. Otherwise we would not know if the evidence supported the charge.

To examine the evidence without interpreting the charge would put a court in a position of not knowing whether evidence of larceny proves a charge of embezzlement since it could not interpret the statute on embezzlement and know its meaning.

Petitioner therefore continues his argument by stating that the Fifth Circuit gave lip service only to the "some evidence" rule in *Braswell* and in *Hardeman* since *Hardeman* was affirmed on authority of the *Braswell* opinion. He states however that in fact the Fifth Circuit did not apply this "some evidence" rule and substituted an erroneous judgment instead.

On Page 21 in petitioner's brief he states that the Fifth Circuit's error was to the effect of its statement in *Braswell*, "it is well established that penal provision in union constitutions must be strictly construed". Petitioner asserts that there is no basis for this principle.

However many cases have applied this principle. Among them were *Braswell v. International Brotherhood of Boilermakers*, 388 F. 2d. 193, Cert. Den., 391 U.S. 935; *Allen v. International Alliance of Theatrical, Stage Employees, et al*, 338 F. 2d. 309; and *Simmons v. Avisco, Local 713*, 350 F. 2d. 1012, wherein it was stated:

"It is established law that a union cannot discipline its members except for offenses stated in its constitution and by-laws, and that the courts lack the power to recognize "implied offenses" and thereby rewrite the union's constitution and by-laws."

Respondent further contends that this principle of strict construction is further enforced by the mandate of congress in 29 U.S.C. Sec. 411 (5) (A) which requires the accused to be served with "written specific charges".

Such a requirement necessarily implies a further requirement of strict construction of the charges. To hold otherwise would destroy the intent of congress in requiring "written specific charges" for such a requirement would be useless if the rule of strict construction and plain meaning were not applied to those charges, and there would be no "full and fair hearing" as required in 29 U.S.C. 411 (5) (C). Therefore congress has expressed a statutory mandate enforcing the rule of strict construction.

As stated before, petitioner recognizes and admits that the "some evidence" rule as stated in *Braswell* and applied in *Hardeman* is the proper standard of review. Basically then his argument is not one of law but is one of fact, for he contends in his brief that the Fifth Circuit Court of Appeals abused this rule and rejected certain evidence as unresponsive and rejected a reasonable interpretation of the union's constitution. His argument is not then one of law which this court should decide but he is asking this court to review the facts and make a finding of fact in his favor.

A. APPLICATION OF THE APPROPRIATE STANDARD OF REVIEW TO THE FACTS OF THE INSTANT CASE.

It is respectfully submitted that whether the evidentiary test is formulated as: (1) Denial of due process to take action on charges "unsupported by any evidence", (2) "Implicit in the requirement of a full and fair hearing is the requirement that there be some evidence to support the

charges made", (3) "A close reading of the record is justified to insure that the findings are not without any foundation in the evidence", the evidence presented to the trial committee of the Local Lodge and the trial committee of the Executive Council was not sufficient to sustain the findings of those bodies and justify Hardeman's expulsion.

In petitioner's brief he goes to great extremes to argue the lawfulness of the expulsion under Article XII, Section 1 of the By-Laws and argues that this charge does conform to the evidence. His argument is wasted in this case since it does not attack the ruling of the District Court on the question of the lawfulness of the expulsion.

The charges made were that Hardeman had violated Article XII, Section 1² and Article XIII, Section 1³, Subordinate Lodge Constitution (see statement of facts, Petitioner's Brief, Page 4.) The trial committee determined that Hardeman was "guilty as charged" (Petitioner's Brief, Statement of Facts, Page 5). The International Union sustained these findings. (Petitioner's Brief, Statement of Facts, Page 6)

² It shall be a violation of these By-Laws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office.

³ Section 1. Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Brotherhood or any District or Subordinate Lodge; who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the
cont'd.

Therefore since Hardeman was found "guilty as charged"; he was found guilty of violating both sections and it is only sufficient that the evidence failed to meet the aforementioned tests for one charge rule to make the expulsion wrongful and unlawful.

Even if there was "some evidence" to support Article XII, Section 1 (which respondent does not admit) Hardeman was in the position of a man going to trial on a two count indictment wherein one count charged a simple assault and the second count charged rape; the evidence being sufficient to support the simple assault but there being no evidence to support the rape charge and the jury coming back with a verdict "guilty as charged". Their verdict would necessarily convict him of the rape count and surely we could not say he had a fair trial.

This was the ruling of the District Court as admitted in Petitioners brief wherein the court charged the jury:

"Now there may be, and I am not ruling on it one way or the other, but I will say this, that there is evidence in here which might support a finding of guilty under Section 1 of Article XII of the Subordinate Lodge By-Laws, but the trial body said we find him guilty and we recommend that he be expelled. They did not say we find him

International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its subordinate Lodges, or who is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood.

guilty under either one section or the other. They said they found him guilty. Inasmuch as there is nothing here which would support a conviction under this section ⁴, then I think the verdict cannot stand and his being convicted, the penalty for which was expelling him, and I think, inasmuch as there is no evidence which would support a finding of the board was erroneous and cannot stand in that respect." (A 37-38)

Earlier the trial court in its charge stated:

"The notice which was sent to Mr. Hardeman by the president of the Local Union, in effect says, we are going to have a hearing and you are charged with violations of Article XIII, Section 1 of the Subordinate Lodge Constitution. Now that is what they said he was going to be tried under, Article XIII, Section 1. I will paraphrase it, *** (court here reads the text of Article XIII, Section 1)***

"As I have said, I have read the entire transcript and I have found nothing which would support a finding of guilt under that particular section."

⁴ Referring to Article XIII, Section 1.

Therefore petitioners elaborate argument as to the application of Article XII, Section 1, is completely irrelevant since it does not attack the ruling of the District Court and therefore does not attack the affirmance of the Court of Appeals.

Let us then examine Article XIII, Section 1, to see how this applies to the evidence taken by the union.

This article clearly refers to someone engaging in some sort of activity of sedition against the union. Someone who would be working to cause a conspiracy to dissolve the union, to make the members dissatisfied and thereby destroy the organization itself. This section cannot in any way be construed to cover an offense when one of the members gets into a fight with one of the officers of the union. This is an attack on an individual by an individual and is resolved among individuals. It is not an effort to destroy the organization itself.

The Fifth Circuit Court of Appeals interpreted Article XIII, Section 1 in its opinion in *International Brotherhood of Boilermakers v. Braswell*, 388 F. 2d. 193, Cert. Den., 391 U.S. 935, when reviewing this same transcript since Braswell was tried simultaneously with Hardeman as a co-defendant. There the court said:

"Article XIII, Section 1 of the Constitution on its face is directed at threats to the union as an organization and to the effective carrying out of the union's aims."

Respondent does not contend that Hardeman should not have been disciplined for his actions. Respondent does contend that Hardeman was found guilty of a charge which

would not apply and therefore his expulsion was erroneous. If Hardeman had been properly charged I submit that his punishment would have been less than expulsion. If he had been properly charged and had been expelled I would submit that a proper theory of the case would be that Hardeman was denied a full and fair hearing in that the punishment did not fit the offense. If this had been the case, Hardeman would have been in the position of an accused being charged and found guilty of running a red light and being given the death penalty. Although it has never been presented I would submit that the requirement of a full and fair hearing requires that the punishment fit the offense. But this is not the case here.

II.

THE NATIONAL LABOR RELATIONS ACT DOES NOT PREEMPT AN ACTION BROUGHT UNDER SECTION 102 OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT WHEREIN A FORMER UNION MEMBER, CLAIMING WRONGFUL EXPULSION, DOES NOT SEEK RESTORATION OF MEMBERSHIP RIGHTS BUT CLAIMS DAMAGES FOR ALLEGED LOSS OF EMPLOYMENT IS A CONSEQUENCE OF HIS WRONGFUL EXPULSION.

Petitioner relies primarily on *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, and *Local No. 207, International Association of Bridge, et al v. Jacob Perko*, 373 U.S. 701, 10 L. ed. 2d. 646, in his argument for preemption. These cases are not precedent for the case now before this court.

The *Garmon* case was decided before the passage of the Labor Management Reporting and Disclosure Act of 1959. The facts in this case are in no way similar to the *Hardeman* case.

In the Garmon case the union had demanded a contract from management to retain in their employment only workers who were members of the union or who had applied for union membership within thirty days. Management had refused this contract on the grounds that its membership had not selected the union as their collective bargaining agent. The union began picketing the company and the company obtained an injunction from a state court and stopped the picketing. There was no case of wrongful discipline and there was no Labor Management Reporting and Disclosure Act to apply.

The Perko case likewise does not apply. Here plaintiff had instituted his action in a state court in Ohio seeking damages under common law to work as a foreman. The union had interfered in his job as a foreman. There was no expulsion and no disciplinary actions taken by the union. The Landrum-Griffin Act was not involved nor did it apply.

Petitioner also argues legislative intent in his brief. He cites several statements from various senators claiming these are evidence of the intent of congress that the Labor Management Reporting and Disclosure Act be subject to the doctrine of preemption by the National Labor Relations Act. The statements when read in his brief merely express a fear that a doctrine of preemption will bar such actions from being brought in state courts where such states had enacted legislation to protect members rights.

Petitioner also argues that in the case of *International Association of Machinists v. Gonzales*, 356 U.S. 607, 78 S. Ct. 923, 2 L. ed. 2d. 1018, that this Honorable Court in affirming this decision and rejecting the doctrine of preemption was merely allowing Gonzales to "fill out" his remedy offered him under the state law. It is presumed that the applicable state law in this case allowed him an injunction and nothing else.

Respondent submits that none of the authorities cited are controlling. Preemption is purely a jurisdictional doctrine to prevent conflicts between federal and state policies. *International Brotherhood of Boilermakers v. Braswell*, 388 F. 2d. 193 Cert. den. 391 U.S. 935. This court stated concerning the doctrine of preemption the following in *Retail Clerk's International Association v. Schermerhorn*, 163, 375 U.S. 96, 94 S. Ct. 219, 11 L. ed 2d. 179:

"Garmon *** merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations *** the purpose of congress is the ultimate touch stone." (Cited in *Braswell*)

Petitioner's suit was framed and brought under Title 29, USCA Sec. 411, Sub-Sec. 5 which states:

"***No member of any labor organization may be fined, suspended, expelled or otherwise disciplined except for non-payment of dues, by such organization or by any officer thereof, unless such member has been (a) served with written specific charges; (b) given a reasonable time to prepare his defense; (c) afforded a full and fair hearing.

The petitioner's action as stated in the complaint is clearly based upon the Labor Management Reporting and Disclosure Act of 1959. The complaint alleged in several counts that plaintiff was expelled from the union and was not afforded a full and fair hearing with the terms of Sub-Section (C) Title 29, USCA, Sec. 411, Sub-Sec. 5. The complaint and evidence clearly showed that the union's board action and expulsion was a result of disciplinary

action against the appellee within the meaning of the above quoted section of Labor Management Reporting and Disclosure Act.

Petitioner also contends that the Labor Management Reporting and Disclosure Act of 1959 not only made it unlawful for a union to expel a member, without a full and fair hearing as aforesaid, but also selected a forum for the enforcement of any infringement on the rights of a union member under the Labor Management Reporting and Disclosure Act. Petitioner contends that the forum selected by Congress under this act was a Federal District Court, and not the National Labor Relations Board. In support of this contention, Respondent cites Title 29, USCA, Sec. 412, which reads as follows:

"Any person whose rights secured by the provision of this sub-chapter have been infringed by any violation of this sub-chapter may bring a civil action in a District Court of the United States, for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the District Court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

This section clearly selects the District Court to be the forum for any complaint arising under the Landrum-Griffin Act of 1959. The section makes it mandatory that if any of these rights have been infringed, as was in this case, that they may bring a civil action in the district Court under the Landrum-Griffin Act.

Respondent's claim for loss of wages and fringe benefits, as a result of this wrongful expulsion, did not cause his action to be preempted by the National Labor Relations Act. The graveman of this case was the wrongful expulsion and violation of the Labor Management Reporting and Disclosure Act, and the damages claimed were the resulting damages for the violation of this act, or "****such relief ***as may be appropriate".

Petitioner's complaint alleges that the damages claimed was loss of income which was brought about as a direct and proximate result of the wrongful expulsion of Hardeman. Title 29, USCA, as quoted above allows a civil action "for such relief *** as may be appropriate". Surely any injury which was brought about as a proximate consequence of the wrongful expulsion would be "such relief *** as may be appropriate". Therefore the Judicial doctrine of preemption which was conceived to prevent the conflict of state and federal jurisdictions can certainly have no application in the face of a mandate from congress.

This civil action referred to in Title 29, USCA, Sec. 412, does not have to be an injunction. Respondent contends that the wording of Section 412 states simply a civil action and the parenthetical portion, "including injunctions", indicates the intent of Section 412 to mean a civil action may be brought either with an injunction or without an injunction. The only other type of relief obtainable in a court of law is damages.

Hence, the language of the Labor Management Reporting and Disclosure Act clearly sets forth the sort of wrong which is prohibited between a union and its member and also selects the district court as a forum in which any suit filed for the enforcement of this act is to be brought. The

damages which are sought in such an action does not change the nature of the action. Therefore respondent submits that a claim for loss of wages or income does not make a suit under Section 102 subject to the doctrine of preemption. "The purpose of Congress is the ultimate touch stone", *Retail Clerk's International Association v. Schermerhorn*, 1963, 375 U.S. 96, 94 S. Ct. 219, 11 L. ed. 2d. 179.

III.

SIGNIFICANCE OF THIS CASE

Respondent submits that the labor movement as developed in this country is one which has evolved from the capitalistic free enterprise system. In other lands where there was no capitalistic free enterprise system the working class turned to communism to solve their burdens and free themselves from oppression by management. In our country following the free enterprise tradition the laboring man banded together in unions in order to barter and trade freely for his product which was the fruit of his labor.

The labor movement has come a long way since the days when the early members of labor unions were tried for conspiracy when seeking to enforce their right to barter and negotiate the price for their product.

Today the laboring man in the United States enjoys an excellent standard of living and many fringe benefits. The problem is no longer long working hours, being under paid and being otherwise exploited by management. In its place his problems came from the solution of these former problems. They arise from the empire that the formation of the trade unions created in this country and from the little dictators and "labor barons" in labor management.

Congress recognized this and this resulted in the bill of rights and Section 102 of the Landrum-Griffin Act. If this section is given its full force and effect it will force the mighty labor unions of this country to recognize and protect the rights of their individual members. They can no longer afford to operate on a dictatorial basis and ignore the rights of the individual.

In the instant case Hardeman was railroaded by a local business agent because of personal or other differences which can brew for a period of time. As in any system of executives, the higher executives have to back up the lesser executives in order to enforce the power structure of any organization be it large corporations, the military or a trade union. Therefore the top echelon backed up and enforced Hardeman's expulsion irregardless of the evil it wrought upon this individual and his family.

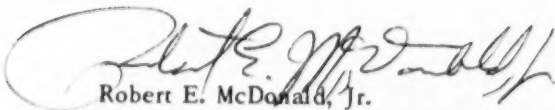
If the Hardeman case is affirmed it will mean that no longer can a local business agent run his local with the power of a dictator threatening trumped up disciplinary action against any individuals that may oppose him. If this case is reversed the purpose of congress in protecting the rights of the individual in the labor unions in this country is destroyed. George Hardeman is not just an individual. He is "everyman" among the forty million members of the unions in this country. Union management can no longer ignore the evil that is done to these individuals if this case is affirmed.

To say that the management of the trade unions in this country is aware of this is to only point out the obvious. They have even procured the top echelon of the AFL-CIO to file an amicus curiae brief in this cause to fight this decision.

CONCLUSION

For the reasons as set out before I respectfully submit that this case should be affirmed.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert E. McDonald, Jr.", with a large, stylized initial "R" and a long, sweeping underline.

Robert E. McDonald, Jr.
2503 First National Bank Building
Mobile, Alabama 36602

INDEX

	<i>Page</i>
Motion	v
Interest of the AFL-CIO	v
Conclusion	vii
Brief	1
Summary of Argument	1
Argument	5
I. §101(a)(5) Of The LMRDA Does Not Authorize The Courts To Review A Union's Determination That The Misconduct Charged Constituted A Violation Of The Union's Constitution	5
II. Title I Of The LMRDA Is Limited To The Protection Of Membership Rights And Does Not Authorize The Courts To Remedy Alleged Union Interference With Job Rights	18
Conclusion	33

Citations

CASES:

<i>Barunica v. Hatters</i> , 321 F.2d 764 (8th Cir., 1963)	20
<i>Boilermakers v. Braswell</i> , 388 F.2d 193 (5th Cir., 1968)	7-8, 15, 16, 20, 25
<i>Calhoon v. Hervey</i> , 379 U.S. 134 (1964)	4, 25, 30-31
<i>Dowd Box v. Courtney</i> , 368 U.S. 502 (1962)	28
<i>English v. Cunningham</i> , 282 F.2d 848 (D.C. Cir., 1960)	16
<i>Figueroa v. NMU</i> , 342 F.2d 400 (2nd Cir., 1965)	21
<i>Garner v. Local 776 Teamsters</i> , 346 U.S. 485 (1953)	4, 25-26
<i>Guss v. Utah L.R.B.</i> , 353 U.S. 1 (1957)	24
<i>Hanna Mining Co. v. District 2 MEBA</i> , 383 U.S. 181 (1965)	32
<i>Lewis v. AFSCME</i> , 407 F.2d 1185 (3rd Cir., 1969)	16-17
<i>Linn v. Plant Guards</i> , 383 U.S. 53 (1966)	32

	<i>Page</i>
<i>Local 1416 ILA v. Ariadne Shipping Co.</i> , 397 U.S. 195 (1970)	32
<i>Local 100 Plumbers v. Borden</i> , 373 U.S. 690 (1963)	4, 20, 31, 32
<i>Local 1625 Retail Clerks v. Schermerhorn</i> , 375 U.S. 96 (1963)	32
<i>Local 357 Teamsters v. NLRB</i> , 365 U.S. 667 (1961)	20
<i>Machinists v. Gonzales</i> , 356 U.S. 617 (1958)	4, 31, 32
<i>Meatcutters v. Jewel Tea</i> , 381 U.S. 676 (1965) ..	28
<i>Mine Workers v. Gibbs</i> , 383 U.S. 715 (1966)	32
<i>NLRB v. Allis-Chalmers</i> , 388 U.S. 175 (1967)	3, 17, 21, 22
<i>NLRB v. Great Dane Trailers</i> , 388 U.S. 26 (1967) ..	20
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941)	26, 27
<i>Radio Officers Union v. NLRB</i> , 347 U.S. 17 (1954)	19, 21, 24
<i>Rekant v. Shochtay-Gasos Local 446</i> , 320 F.2d 271 (3rd Cir., 1963)	20-21
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959)	4, 20, 25, 26, 29, 32
<i>Smith v. Evening News</i> , 371 U.S. 195 (1962)	28, 29
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967)	28, 29
<i>Vars v. Boilermakers</i> , 320 F.2d 576 (2nd Cir., 1963)	13-14
<i>Wirtz v. Hotel Employees Union Local 6</i> , 391 U.S. 492 (1968)	vi

STATUTES:

Labor Management Reporting and Disclosure Act
of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*

Title I	vi, 3, 4, 22, 23, 24, 25, 30, 31
Titles II-VII	22
§101(a)(1)	15
§101(a)(2)	15
§101(a)(5)	vi, 1, 2, 3, 6, 8, 9, 11, 12, 13, 15, 17, 18
§102	31

	<i>Page</i>
§103	24
§603	24
§609	15
National Labor Relations Act, as amended 61 Stat.	
136, 73 Stat. 519, 29 U.S.C. 151 <i>et seq.</i>	
§7	29
§8(a)(3)	3, 18, 22
§8(b)(2)	3, 18, 19, 22
§8(b)(4)	20
§14(c)	24
§301	28, 29
§303	20

MISCELLANEOUS:

Christensen, <i>Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Society</i> , 43 N.Y.U.L. Rev. 227 (1968)	8-9, 14-15
Dept. of Labor, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, Titles I-VI	9, 10, 11, 12, 23, 24
Final Report of the National Commission on the Causes and Prevention of Violence (1969)	17
Sovern, <i>Section 301 And The Primary Jurisdic- tion Of The NLRB</i> , 76 Harv. L. Rev. 529 (1963)	28-29
Summers, <i>The Law Of Union Discipline: What The Courts Do In Fact</i> , 70 Yale L.J. 175 (1960)	16

IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

No. 123

**INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIPBUILDERS,
BLACKSMITHS, FORGERS AND
HELPERS, AFL-CIO,**
Petitioner,

v.

GEORGE W. HARDEMAN.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**MOTION FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE**

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief as *amicus curiae* in the instant case in support of the position of the Petitioner, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the Petitioner has been obtained. Counsel for Respondent has refused his consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred twenty-one affiliated labor organizations having a total membership of approximately thirteen million working men and women.

In the instant case the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, expelled George W. Hardeman as a member. The Union did so because his fellow members concluded, after a

proceeding in which Hardeman was served with a specific charge, was allowed ample time to prepare his defense and was accorded a hearing at which both he and his accusers were given a full opportunity to develop their contentions, that he had attacked and beaten the business agent of his Local in order to secure a job referral, and that this attack violated the Union's Constitution and By-Laws. The courts below reversed this judgment because they disagreed with the Union's interpretation of its internal law, and allowed the jury to mulct the Union for \$152,150 in damages. The purpose of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, the federal law pursuant to which the decisions below were rendered was "to protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government." *Wirtz v. Hotel Employees Union Local 6*, 391 U.S. 492, 497 (1968). Here the rank and file members of the Union did participate fully in the democratic process of self-government. The expulsion they decreed served to safeguard the interest in the peaceful pursuit of such processes. Yet the outcome has been that their dues moneys are to be paid over to Hardeman to provide him with a lifetime annuity.

It is the AFL-CIO's view that such a result serves to thwart the practice of democratic self-government that it was the LMRDA's avowed aim to promote. For this reason we seek leave to file a brief *amicus* setting forth the Federation's views on the legal issues presented. That brief will concentrate on two points, both of which supplement the Union's arguments. First, that § 101(a)(5) of the LMRDA does not authorize the courts to review a union's determination that the misconduct charged states a violation under the union's constitution. And second, that Title I of the LMRDA is limited to the protection of membership rights and that the federal courts are not empowered to remedy alleged union interference with job rights, a subject which is within the exclusive primary jurisdiction of the National Labor Relations Board.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the instant case in support of the position of the Petitioner.

Respectfully submitted,

J. ALBERT WOLL
General Counsel, AFL-CIO

ROBERT C. MAYER
LAURENCE GOLD
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

THOMAS E. HARRIS
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D. C. 20006

August, 1970

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1970

No. 123

**INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIPBUILDERS,
BLACKSMITHS, FORGERS AND
HELPERS, AFL-CIO,
*Petitioner,***

v.

GEORGE W. HARDEMAN.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**BRIEF FOR THE
AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE**

This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*. The interest of the AFL-CIO is set out at pp. v-vi of that motion.

SUMMARY OF ARGUMENT

I

Section 101(a)(5) of the LMRDA provides a basic code of procedure, encompassing the service of "specific charges . . . time to prepare [a] defense [and] a full and fair hearing," designed to assure that a charged member will have a fair chance to defend his conduct by disproving the allegations against him. The courts below were of the view that this provision for procedural due process empowered them to review the Union's interpretation of its internal laws, as well as its determination that the specific

acts alleged were proved. But Congress considered and rejected, as inconsistent with the conception that Title I was to supplement, rather than supplant, state law by affording limited federal protection for basic membership rights, the proposition that the prohibition against improper discipline should empower the courts to measure the offense charged and proved against the union's constitution to ensure that the verdict was justified by union law. Thus, the courts below transgressed the limitation on judicial authority Congress decreed.

Section 101(a)(5) is the lineal successor of § 101(a)(6) of the "Bill of Rights" proposed by Senator McClellan as a floor amendment to S. 1555, the so-called "Kennedy-Ervin" Bill. Section 101(a)(6) contained both substantive and procedural guarantees. For it required that the discipline imposed by a union be based on "a breach of a published written rule of such organization," and whether a particular verdict has such a base turns on what the union rule in question means. If Senator McClellan's original § 101(a)(6) had been enacted it would have provided a firm support in law for the Fifth Circuit's view that the federal courts are empowered to measure the legal theory of the charge against the provisions of the union's constitution. But the published rule requirement did not survive. It was excised in response to Senator Kennedy's argument that it would create a federal straitjacket which would, *inter alia*, preclude union discipline of acts that could be characterized as *malum in se*, such a bribery or rape, and even though the member had been apprised of the specific misconduct he was being called to account for, given time to prepare his defense, and afforded a full and fair hearing on the charges made. Thus § 101(a)(5) was limited to procedural guarantees in order to preclude the possibility that the federal courts would create such a straitjacket. The courts below therefore committed plain error by overturning Hardeman's expulsion on the ground that in their view the charge failed to state a violation of the Union's Constitution.

II

In the instant case Hardeman sought and received damages on the theory that the Union discriminated against him in job referrals because he had been a "bad" member. It is well settled that such discrimination is an unfair labor practice. Sections 8(a)(3) and 8(b)(2) of the NLRA "were designed to allow employees to . . . be good, bad, or indifferent members . . . without imperiling their livelihood," *Radio Officers Union v. NLRB*, 347 U.S. 17, 40 (1954). And the most cursory review of the District Court proceedings demonstrates that despite the circumstance that it was tried in court and to a jury, the fact is that the damage claim here precipitated an unfair labor practice hearing. The courts below permitted this result because they read Title I as a grant of concurrent jurisdiction over activity violative of the NLRA which is alleged to have resulted from internal union discipline found to be improper under §101(a)(5). This reading of the LMRDA is erroneous. Congress intended that Title I would be limited to the protection of membership rights and that the NLRB was to have exclusive primary jurisdiction to regulate and protect job rights.

In 1947, Congress regulated union action against job rights with great particularity. At the same time, however, Congress made an explicit judgment not to regulate membership rights, *NLRB v. Allis-Chalmers*, 388 U.S. 175, 184-185 (1967). The result was to establish a clear-cut dichotomy between job rights whose protection was entrusted to the NLRB, and membership rights, which were to be regulated by the states. In essence, the LMRDA represented a congressional decision that it was necessary to enact legislation which would supplement the NLRA and state law by protecting membership rights through the Secretary of Labor and the federal courts. The main outlines of the 1959 legislation, and the legislative history of Title I demonstrate that, as was true in 1947, Congress's actions were rooted in the conception that employment rights and membership rights were separate and distinct.

In light of the fact that Title I of the LMRDA is limited to the protection of membership rights, it follows from the principles enunciated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and in *Calhoon v. Harvey*, 379 U.S. 134 (1964), that the courts do not have the authority to remedy alleged union interference with job rights. For both *Garmon* and *Garner v. Local 776, Teamsters*, 346 U.S. 485, 490 (1953), demonstrate that the federal courts, as well as the state courts, are prohibited from trenching upon the exclusive primary jurisdiction of the NLRB. And *Calhoon v. Harvey* holds that it is improper to expand the scope of Title I if the result is to frustrate Congress's determination that two separate procedures—one administrative and one judicial—must be followed in order to secure the complainant the relief he desires, see, 379 U.S. at 139-141.

Machinists v. Gonzales, 356 U.S. 617, 618-621 (1958), held that a state court exercising its acknowledged jurisdiction over a membership dispute could, in order to "fill out" the remedy, award damages based on alleged union interference with job rights despite the fact that this "remedial action" invades the exclusive primary jurisdiction of the NLRB. In *Local 100 Plumbers v. Borden*, 373 U.S. 690, 697 (1963), the Court carefully reserved the question of "the extent to which the holding in *Garmon*, 359 U.S. 236, *supra*, qualified the principles declared in *Gonzales* with respect to jurisdiction to avoid consequential damages." It is our view that the *rationale* of *Garmon* completely undermines the above noted portion of *Gonzales*. The theory of *Gonzales* is unsound because its focus on the legal labels utilized to characterize the claim presented, rather than on the nature of the underlying activity in question, permits the plaintiff by artful pleading to shift the line of demarcation in the direction of greater or lesser court jurisdiction depending on the nature of his interests. This is completely inconsistent with the recognition that "Congress has entrusted administration of the labor policy for the Nation to [the NLRB]" and that "administration is more than a means

of regulation; administration is regulation," *Garmon*, 359 U.S. at 242, 243.

ARGUMENT

I

§101(a)(5) OF THE LMRDA DOES NOT AUTHORIZE THE COURTS TO REVIEW A UNION'S DETERMINATION THAT THE MISCONDUCT CHARGED CONSTITUTED A VIOLATION OF THE UNION'S CONSTITUTION

1. On October 11, 1960, Herman H. Wise, the business agent of Subordinate Lodge No. 112¹ of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO,² filed an intra-union charge alleging that George Hardeman, one of the Local's members, had violated Art. XII, Sec. 1 of the Local's By-Laws (which makes it an offense to use force or violence to prevent any Union official from properly discharging the duties of his office), and Art. XIII, Sec. 1 of the Local's Constitution (which makes it an offense to create dissension among the Union's members, or to work against the interest or harmony of the Local), in that:

"at the union's office at 750 Conti Street at approximately 10:10 A.M., on October 5, 1960, when I walked out of my office into the waiting room with W. C. Bell . . . Mr. Hardeman raised up out of his chair and handed me a telegram and asked me to explain it. While I was reading the telegram, Hardeman, without warning, started beating me about the face and head, causing severe injury. . . . Hardeman continued to beat me about the face and head until he was exhausted. I then went back to the office 'phone and called the police." (A. 40-42)

This charge was heard by a three-member trial board on November 12, 1960 (A. 39-40). At the hearing W. C. Bell and Rufus Rains testified that Hardeman had attacked Wise (A. 43, 52). And Hardeman admitted that he had made a calculated decision to precipitate the affray:

¹ Hereinafter "the Local."

² Hereinafter "the International."

"[On] Oct. 3rd . . . I told [Wise] that I knew he had a telegram asking for me, and I was ready to go to work. Wise said he didn't know if he would send me or not . . . I told Wise then, 'You know I need to work and if you don't give me a referral, me and you are going round and round.' . . . I went to the hall Wednesday October 5th, and waited from the time the hall opened until we had the trouble. I tried to make up my mind what to do, whether to sue the Local or Wise or beat hell out of Wise, and then I made up my mind. . . . I . . . asked Wise why he didn't send me on the job, when I knew he had a telegram asking for me . . . Then the fight started." (A. 49-50)

The trial board found Hardeman guilty as charged. The Local's membership sustained this verdict and by a separate vote determined that Hardeman be expelled (A. 56). Thereafter on appeal the International's President and Executive Board affirmed (A. 56-60).

The International's Executive Board ruled on Hardeman's appeal on April 19, 1961. On April 4, 1966, Hardeman brought suit in the United States District Court for the Southern District of Alabama against the International, on the ground that the Union disciplinary proceedings had not complied with §101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, which provides:

"No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

The District Court ruled (A. 36-38):

"[W]hether or not [Hardeman] was rightfully or wrongfully discharged or expelled is a pure question of law for me to determine.

"There is no evidence in [the] transcript [of the trial board hearing] which would justify [Hardeman] being convicted or found guilty in Section 1 of Article 13 of the Subordinate Lodge Constitution. All that is in this transcript is about the fight. That is the whole thing that is in that transcript.

* * *

"I am telling you, as a matter of law, that under the proof, the finding which resulted in his being expelled, cannot legally stand and therefore he was wrongfully expelled.

"Now, what you Ladies and Gentlemen have to decide is this; was he thereby damaged, and, if so, how much."

The Fifth Circuit affirmed *per curiam* relying on its decision in *Boilermakers v. Braswell*, 388 F.2d 193 (5th Cir., 1968), which was characterized "as a case growing out of the exact factual situation as that involved in the present case" (A. 66-67). In *Braswell* the court below had reasoned (A. 76-78):

"Braswell does not deny that he struck Wise in the face and broke his nose. The question is whether this act constituted a violation of the Union Constitution and Bylaws that would justify his expulsion. . . . [T]he Union charged Braswell with violations of two provisions . . . Article XIII, Section 1 [of its Constitution] and . . . Article XII, Section 1 of the bylaws.

* * *

"[U]nder the authorities, Braswell's expulsion was not valid under either provision mentioned in the charges . . . [I]n *Allen v. International Alliance of Theatrical, Stage Employees and Moving Picture Operators*, 5 Cir. 1964, 338 F.2d 309, . . . we stated:

'In determining whether discipline was properly imposed * * * any ambiguity or uncertainty in the constitution must be construed against the union and in favor of the member, in accordance with well established principles of documentary construction.' 338 F.2d at 316.

“[W]e also rely on *Vars v. International Brotherhood of Boilermakers*, 2 Cir. 1963, 320 F.2d 576, 578. There the court observed:

‘[I]mplicit in the requirement of a full and fair hearing is the requirement that there be some evidence to support the charges made. . . .’

“Applying these principles to the undisputed underlying facts we find that the act charged to Braswell was a blow struck in anger, and nothing more. However reprehensible this act may be, it did not constitute a violation of the provisions in the charges.”

2. The theory of the intra-union charge filed by Wise was that on October 5, 1960, Hardeman had attacked and beaten a Local officer and that this attack constituted a violation of both Art. XII, Sec. 1 of the Local's By-Laws in that it was the use of force to influence the officer's decisions on job referrals; and Art. XIII, Sec. 1 of the Local's Constitution in that such an attack creates dissension within, and works against the interest and harmony of, the Local. Thus the charge raised two classes of questions. First, questions relating to the underlying facts: Did the attack take place as alleged; and second, questions relating to the proper interpretation of the Union's Constitution and By-Laws: Does such an attack come within the purview of the prohibitions just cited.

Section 101(a)(5) provides a basic code of procedure, encompassing the service of “specific charges . . . time to prepare [a] defense [and] a full and fair hearing,” designed to assure that a charged member will have a fair chance to defend his conduct by disproving the allegations against him. The courts below were of the view that this provision for procedural due process empowered them to review the Union's interpretation of its internal laws, as well as its determination that the specific acts alleged were proved:

“Patently, [the Braswell opinion] was not an examination of the record to ascertain whether there was any evidence to support the expulsion. Rather, it was a judicial interpretation of the union's constitution and by-laws and a reversal of the union action based upon a

contrary interpretation." Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Society*, 43 N.Y.U.L. Rev. 227, 253 (1968).

But as we shall demonstrate Congress considered and rejected, as inconsistent with the conception that Title I should supplement, rather than supplant, state law by affording limited federal protection for basic membership rights, the proposition that the prohibition against improper discipline should empower the courts to measure the offense charged and proved against the union's constitution to ensure that the verdict was justified by union law. Thus, the courts below transgressed the precise limitation on judicial authority Congress decreed.

Section 101(a)(5) is the lineal successor of § 101(a)(6) of the "Bill of Rights" proposed by Senator McClellan as a floor amendment to S. 1555, the so-called "Kennedy-Ervin" Bill. Senator McClellan's § 101(a)(6) stated:

"(6) *Safeguards Against Improper Disciplinary Action.*—No member of any such labor organization may be fined, suspended, expelled, or otherwise disciplined by such organization or any officer thereof except for breach of a published written rule of such organization which is not inconsistent with any of the provisions of this title. Disciplinary action may not be taken unless such member has been (A) served with a written copy of the provisions of the constitution and bylaws or other governing charter of such organization which contains a listing of the rights and safeguards afforded him pursuant to this title with respect to the conditions under which disciplinary action may be taken; (B) served with written specific charges; (C) given a reasonable time to prepare his defense; (D) afforded a full and fair hearing; and (E) afforded final review on a written transcript of the hearing, by an impartial person or persons (i) agreed to by such organization and the accused, or (ii) designated by an independent arbitration or mediation association or board." Dept. of Labor, *Legislative History of the Labor Management Reporting and Disclosure Act of 1959*, Titles I-VI, 248.³

³ Hereinafter "Leg. Hist."

~~of such organization," and whether a particular verdict has such a base turns on what the union rule in question means.~~

Senator Kennedy led the fight for rejection of the McClellan amendment to S. 1555. In his most comprehensive statement of opposition he noted there were "five reasons why I think the amendment is either poorly drafted or poorly conceived," Leg. Hist. at 270. After discussing the provision dealing with membership lists the Senator turned to § 101 (a) (6):

"Second, I invite attention to page 4, section 6, 'Safeguards Against Improper Disciplinary Action.' Beginning on line 8, we read:

'No member of any such labor organization may be fined, suspended, expelled, or otherwise disciplined by such organization or any officer thereof except for breach of a published written rule of such organization which is not inconsistent with any of the provisions of this title.'

"In the case of Mr. Smith, in Tennessee, the Teamster official who bribed a judge, unless there were a specific prohibition against bribery of judicial officers written into the constitution of the union, then no union could take disciplinary action against officer or member guilty of bribery.

"If a union officer were guilty of rape, unless a prohibition against rape were written into the union constitution, the union would be prohibited from taking any disciplinary action against an officer or member who committed such a crime.

"It seems to me that we can trust union officers to run their affairs better than that." Leg. Hist. at 271.

At first it appeared that Senator Kennedy's arguments were to be without effect. The Senate originally passed the McClellan "Bill of Rights." But subsequent developments demonstrate that Senator Kennedy's arguments did have a substantial impact. For Senator Kuchel, on behalf of a bipartisan group of Senators who had come to the conclusion that the McClellan proposal went too far in the direction of government control of internal union affairs, introduced a substitute "Bill of Rights," Leg. Hist. at 282-283. The

Kuchel substitute transformed § 101(a)(6) into § 101(a)(5) in its present form. And the new § 101(a)(5) was responsive to Senator Kennedy's criticism of the McClellan proposal, for it struck the requirement that discipline must be based on a published written rule. Senator Kuchel stated:

"On the basis of the debate [on the McClellan proposal], I concluded—as did many other Senators—to support the bill of rights amendment offered by the Senator from Arkansas. . . .

"The next day, I, like many of my colleagues, read the text of the amendment offered by the Senator from Arkansas for which I had voted. . . .

"Others of my colleagues on both sides of the aisle did what I did—read and studied the amendments. It became apparent that there were some obvious questions as to parts of the language used. I concluded that in this proposed legislation there were provisions which were imperfectly drawn, which should be improved, and changed.

"Thus, with some of my colleagues on this side of the aisle and with some of my colleagues on the other side of the aisle, I began to explore the possibility of keeping that which the Senator from Arkansas advocated, namely, a bill of rights for labor, but of writing those rights in clear, unmistakable, reasonable, and just terms. That is what we tried to do.

. . .

"We believe, Mr. President, that [the] language [of § 101(a)(5)] is clear and explicit, and provides the usual reasonable constitutional basis upon which charges might be brought. We believe further that the language in subdivision (6) of the amendment of the able Senator from Arkansas, upon which we voted the other night, did raise some rather vexing questions. . . ." Leg. Hist. at 283-284.

After the Kuchel amendment had been adopted consideration of the "Bill of Rights" began in the House Committee on Education and Labor. Both Senator McClellan, as a supporter of the Senate bill, and Senator Goldwater, as a critic of that bill on the ground that its limitations on union conduct were not sufficiently stringent, testified before the Committee in order to give it the benefit of their considered views on the meaning of S. 1555. Both recognized the limited scope

of § 101(a)(5). Senator Goldwater in reviewing and comparing the McClellan and Kuchel proposals, noted:

"The bill of rights in the Senate bill requires that the union member be served with written specific charges prior to any disciplinary proceedings but it does not require that these charges, to be valid, must be based on activity that the union had proscribed prior to the union member having engaged in such activity. In contrast, the McClellan bill of rights which was stricken after having been adopted, prohibited any disciplinary action against a union member unless it is based on a breach of a published written rule of such labor organization." Leg. Hist. at 308.

And as to § 101(a)(5), Senator McClellan stated:

"The AFL-CIO contends that section 101(a)(5), which provides safeguards against improper disciplinary action, is unreasonable because the requirement of 'written specific charges' is too vague; because 'full and fair hearings' are too uncertain; . . . The answer: A charge must only be specific enough to inform the accused member of the offense that he has allegedly committed." Leg. Hist. at 315.

The Landrum-Griffin bill as introduced in the House incorporated § 101(a)(5) as passed by the Senate, and the Committee Bill, H.R. 8342, while differently worded, was acknowledged to be without "substantive difference," Leg. Hist. at 331. Thus, to all intents and purposes the debate on § 101(a)(5) ended in the Senate.

If Senator McClellan's original § 101(a)(6) had been enacted it would have provided a firm support in law for the Fifth Circuit's view that the federal courts are empowered to measure the legal theory of the charge against the provisions of the union's constitution. For under § 101(a)(6) discipline could have been imposed only for a breach of a published written rule. To implement this substantive guarantee the courts would have had to decide whether the specific misconduct charged was interdicted by the union constitution. The courts, in other words, would have had to interpret the union's constitution in order to measure the va-

lidity of the verdict. But the published rule requirement did not survive. It was excised in response to Senator Kennedy's argument that it would create a federal straitjacket which would, *inter alia*, preclude union discipline of acts that could be characterized as *malum in se*, such as bribery or rape, and even though the member had been apprised of the specific misconduct he was being called to account for, given time to prepare his defense, and afforded a full and fair hearing on the charges made.

Thus § 101(a)(5) was limited to procedural guarantees in order to preclude the possibility that the federal courts would create such a straitjacket. And as Senator Goldwater's testimony to the House demonstrates, all concerned recognized that § 101(a)(5), as opposed to Senator McClellan's § 101(a)(6), would not authorize the courts to grant relief to a member whose essential complaint was that the charge against him was defective in that the misconduct alleged was not interdicted by the union's constitution and by-laws. The courts below therefore committed plain error by overturning Hardeman's expulsion on the ground that in their view the charge failed to state a violation of the Union's Constitution.

Three basic caveats to the foregoing are in order. First, it is not our purpose to challenge the generally accepted view that in a § 101(a)(5) case the courts are empowered to assure that there is "some evidence" to support the verdict. This view is based on the premise that it is essential to fair procedure that the member be served in advance of trial with a charge which informs him exactly which of his actions he is being called to account for. The value of a specific charge in turn depends on the charging party being required to come forward at the hearing with evidence to support the specific charge made. Thus, as recognized in *Vars v. Boiler-makers*, 320 F.2d 576, 578 (2d Cir., 1963), relied on in *Braswell* (A. 78), "implicit in the requirement of a full and fair hearing is the requirement that there be some evidence to support the charges made." For the requirement of specific charges "means that the subsequent discipline must be

based upon the charges served" (*Vars*, 320 F.2d at 579, Hays J., concurring). And if there is no evidence supporting the charge, a court reviewing the proceeding is forced to conclude that this limitation has not been met:

"If there is to be no examination of [the union] hearing upon judicial review under section 101(a)(5), except as to matters of procedure, those procedures can easily be converted into empty formalities entirely lacking the substance of actual judgment implicit in the term 'full and fair.' Accordingly, it is difficult to disagree with the Second Circuit's belief that some review of the basis of the union tribunal's judgment is necessary." Christensen, 43 N.Y.U.L. Rev. at 251-252.

There is, however, nothing in § 101(a)(5), or the foregoing argument from its structure and logic, which leads to the conclusion that the procedural purposes of that Section require the courts to decide whether the theory of the charge is sound as a matter of internal union law. Indeed, the "some evidence" rule itself is a threat to vital competing values relating to union autonomy and such a further step would entirely undercut those values:

"The essential question remains as to whether or not it is possible to keep the range of [the] review [established in *Vars*] within limits; limits which are vital if the federal bench is not to become an inexpert, super-international trial board appeals tribunal.

"A standard requiring reversal of a trial board where there is no evidence in the record to sustain its verdict is perhaps unavoidable. But the 'no evidence' rule, . . . requires the utmost in judicial restraint if it is not to slowly but surely transform itself into a balancing of evidence test. . . . A statutory requirement of a 'full and fair hearing' is considerably short of an authorization for full judicial review of the 'law' and the facts. Congress, by using the phrase, may well have intended that the courts not rubberstamp empty verdicts merely because notice and hearing formalities were observed. But assuredly, Congress is familiar enough with the drafting of judicial review provisions to have authorized the federal district courts to assert broader powers

in plain language—if that is what was desired. The obvious tenor of section 101(a)(5) is to establish rules essentially procedural in nature, rather than to furnish district court review of the merits of a dispute between member and union. . . . [Thus] decisions such as *Braswell* . . . are not based upon visible statutory authority for the scope of their review. Conversely, they establish judicial power in precisely the most damaging fashion, i.e., by making a union's interpretations of its own basic 'law' subject to the removed, untutored, and possibly antipathetic judgment of a court." Christensen, 43 N.Y.U.L. Rev. at 252, 253, 254.

And as we have shown, during the evolution of § 101(a)(5) Congress recognized the importance of these competing considerations and in order to serve them, precluded judicial review of the union's interpretation of its constitution and bylaws.

Second, the reading of § 101(a)(5) we propose does not prevent the courts from interpreting a union constitution in cases involving a claim, which could not be made here, that the discipline imposed worked a deprivation of the basic substantive rights guaranteed by § 609. Sections 101(a)(1) and (2) do incorporate substantive guarantees. And the preservation, in those Sections, of union authority to enact "reasonable rules" requires judicial interpretation of the union's internal law. Thus, the argument against the expansive scope of judicial review over pure § 101(a)(5) actions undertaken in *Braswell* does not mean that:

"where the action of a trial board directly contravenes some other provision of the Act's Bill of Rights by, for example, imposing discipline for use of the freedom of speech guaranteed therein, the court should, or could, view section 101(a)(5) in total isolation from section 101(a)(1). But the substantive principles invalidating the disciplinary actions in those circumstances arise from the statute, not from judicial views as to the meaning of a constitutional provision or a judicial balancing of the evidence." Christensen, 43 N.Y.U. L. Rev. at 254.

Indeed the fact that Congress specified the substantive interests it deemed worthy of protection relieves what might otherwise be a felt necessity to expand §101(a)(5) beyond its intended reach in order to assure that union disciplinary proceedings do not interfere with the public interest in free and democratic trade unionism, compare the explanation of the development of the relevant common law in Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 Yale L.J. 175 (1960).

Finally, we wish to emphasize that the decision below is erroneous even assuming *arguendo* that §101(a)(5) does allow the courts to review the union's interpretation of its internal law. The basic premise articulated in *Braswell* is that "any ambiguity or uncertainty in the constitution must be construed against the union" (A. 78). But a union constitution is not a contract of adhesion. It is a charter of self-government, enacted by the members, subject to revision by democratic means and administered by elected officers. Thus, the generally accepted rule is "that courts will accept the correctness of an interpretation fairly placed on union rules by the union's authorized officials," *English v. Cunningham*, 282 F.2d 848, 850 (D.C. Cir., 1960). As the Third Circuit recognized in *Lewis v. AFSCME*, 407 F.2d 1185 (3rd Cir., 1969), this rule is supported by:

"The reasoning of the Supreme Court in the 'Steel Workers Trilogy' . . . [which emphasized] that labor matters are best left to those who understand the language and the workings of the shop, those who have a precise knowledge of what has come to be known as the 'industrial common law,' [and that] even the 'ablest judge cannot be expected to bring the same experience and competence [as an arbitrator] to bear upon the determination of a grievance, because he cannot be similarly informed' . . . [This reasoning] applies with equal force to cases arising out of an internal union discipline. 'The provisions of the L.M.R.D.A. were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the opera-

tion of unions which would justify a broad power to interfere * * * General supervision of unions by courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations.' *Gurton v. Arons*, 339 F.2d 371 (2 Cir. 1964)."

And, of course, the general rule is in accord with Congress's concern that "in establishing and enforcing statutory standards great care should be taken not to undermine union self government." S. Rep. No. 187, 86th Cong., 1st Sess., quoted in *NLRB v. Allis-Chalmers*, 388 U.S. 175, 194 (1967).

It is beyond dispute that the provisions of union law (Art XII, Sec. 1 of the By-Laws and Art. XIII, Sec. 1 of the Constitution) relied on by the Local and International, if fairly interpreted, do support the expulsion of Hardeman. The attack on Wise fits the proscription on the use of force to prevent an officer from discharging his duties exactly. And it is entirely rational to say that such an attack creates dissension and disharmony. One does not have to be a student of the Final Report of the National Commission on the Causes and Prevention of Violence, xv (1969), to recognize that the settlement of the type of dispute present here by force threatens the organization as a functioning entity just as surely as dual unionism. The Fifth Circuit's view that "[Hardeman's] fist was not a . . . threat to the union as an organization and to the effective carrying out of the union's aims" (A. 78-79) is simply bad political science and worse law.

The error of the courts below is that they did not even consider the possibility that the Union's views on the meaning of its Constitution and Bylaws were worthy of respectful consideration. Indeed, their opinions make it apparent that despite the anomaly in finding such authority in a provision providing for procedural due process they viewed §101(a)(5) as allowing them to treat the proper interpretation of the Union's Constitution as a matter of first impression within their entire control. And it is certain that they did not give any weight to the consideration that their reading of the Constitution and Bylaws substantially

eroded the Union's ability to protect its interest in peaceful procedures. In sum, the decisions below are a paradigm of the unsound results which are bound to flow from the failure to appreciate the value of union autonomy.

II

TITLE I OF THE LMRDA IS LIMITED TO THE PROTECTION OF MEMBERSHIP RIGHTS AND DOES NOT AUTHORIZE THE COURTS TO REMEDY ALLEGED UNION INTERFERENCE WITH JOB RIGHTS

1. The Complaint suggests that the instant case presents a single substantive issue: Did the Union disciplinary procedures which led to Hardeman's expulsion from membership meet the standards of §101(a)(5) (A. 2-8). The most cursory review of the District Court proceedings, however, demonstrates that in reality two substantive issues were tried: the validity of the expulsion under § 101(a)(5); and the question of whether the Union discriminated against Hardeman in the operation of its referral system in violation of §§ 8(a)(3) and 8(b)(2) of the National Labor Relations Act, as amended 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*

The instant suit is for damages and Hardeman's expulsion, standing alone, could only have resulted in actual damages for loss of fraternal benefits and possibly for pain and suffering. Recognizing this, his pleadings alleged that as a "proximate result" of the alleged §101(a)(5) violation Hardeman was "unable to work now that he has lost his Union Card and membership in the Union" (A. 4). Obviously, this "result" did not flow from the Union's official disciplinary proceedings; the sole penalty decreed was expulsion. Nor did it flow from any physical impairment visited upon Hardeman by the Union; he was as able to work the day after his expulsion as the day before. Finally, it did not flow from any legal inhibition upon Hardeman, or the employers who might wish to utilize his services, growing out of his expulsion. For it is perfectly well settled that:

"The policy of the [NLRA] is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers Union v. NLRB*, 347 U.S. 17, 40 (1954).

Thus the alleged job loss here was not a direct consequence of the expulsion. The question of whether the Union was responsible for Hardeman's failure to secure work turned on an inquiry into events subsequent to and distinct from that discipline. And this inquiry took the same course as would an NLRB hearing to determine whether any union was guilty of a violation of §8(b)(2) as construed in *Radio Officers*. To make his case, Hardeman testified that he had received only one referral after his expulsion and that he was unable to secure work at the shops and shipyards in the Mobile area which employed boilermakers, and he attributed his difficulties to the Union's animosity (A. 17-21). The Union defended against the charge that Hardeman's loss of membership had cost him work by showing that during 1960 and 1961 construction jobs within its jurisdiction were so scarce that the maximum percentage of its members employed at any one time was 25%, that its referral system for construction jobs was non-discriminatory and was open to non-members and members on an equal basis (as to this point the Union was corroborated by Kittrell, a witness called by Hardeman), that as to non-construction work half the boilermakers working in the shops and shipyards were non-members, that Hardeman was referred out immediately after he was expelled, and that after May 3, 1961, Hardeman was ineligible for referral because he did not register his availability monthly as required by the rules printed on the referral card he had in his possession (A. 22-35). The trial of the "damage" issue, therefore, focused on the reasons for Hardeman's failure to receive a job referral and ultimately on the Union's motives. And of course the responsibility to ascertain whether a refusal to refer is for a union reason is at the heart of the NLRB's mandate, see,

e.g., *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); *Local 357 Teamsters v. NLRB*, 365 U.S. 667 (1961). Thus despite the circumstance that it was tried in court and to a jury, the fact is that Hardeman's claim for damages precipitated an unfair labor practice hearing.

The foregoing brief summary of the evidence amply supports this Court's conclusion that "the problems inherent in the operation of union hiring halls are difficult and complex . . ." *Local 100 Plumbers v. Borden*, 373 U.S. 690, 695 (1963). It is our view that Congress has reserved resolution of these "difficult and complex . . . problems" to the NLRB, the "single expert federal agency" *ibid.*, created to deal with questions relating to alleged union interference with employment rights; and that while the federal courts have jurisdiction to hear claims dealing with interference with membership rights, this does not provide authority to invade the primary exclusive jurisdiction of the Board as explicated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), under the rubric of awarding consequential damages for an expulsion from membership found to be improper under the LMRDA.

2. In *Braswell*, the Fifth Circuit stated "the [exclusive primary jurisdiction] question is one of Congressional intent. . . . A clear indication therefore of Congressional intent to confer jurisdiction on the federal district courts to award damages for actions—even if these actions were also violations of the NLRA and within the jurisdiction of the NLRB—would control" (A. 73). This is entirely fair so far as it goes. There can be no doubt that when it wishes to do so Congress can invest the federal courts and the NLRB with concurrent jurisdiction over unfair labor practices, compare §8(b)(4) with §303. But Congress in enacting Title I of the LMRDA did not so intend—as we shall now demonstrate.⁴

⁴ The lower courts are in a certain disarray as to this issue, see, e.g., *Barunica v. Hatters*, 321 F.2d 764, 767 (8th Cir., 1963) (Blackmun J.) (LMRDA complaint "relat[ing] only to discrimination in regard to hire" preempted); *Rekant v. Shochtay-Gasos Local*

As *Radio Officers* makes clear, in 1947 Congress regulated union action against job rights with great particularity. At the same time, however, Congress made an explicit judgment not to regulate membership rights. As this Court noted in *Allis-Chalmers*, 388 U.S. at 184-185:

"It is significant that Congress expressly disclaimed in connection [with §8(b)(2)] any intention to interfere with union self-government or to regulate a union's internal affairs. The Senate Report stated:

'The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership.'

"Senator Taft, in answer to protestations by Senator Pepper that §8(b)(2) would intervene in the union's internal affairs and 'deny it the right to protect itself against a man in the union who betrays the objectives of the union . . .,' stated:

'The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members. All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than non-payment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion.' (emphasis supplied)"

The result was to establish a clear-cut dichotomy between job rights, whose protection was entrusted to the NLRB, and membership rights, which were to be regulated by the states.

446, 320 F.2d 271 (3rd Cir., 1963) (no preemption); *Figuroa v. NMU*, 342 F.2d 400, 405 (2nd Cir., 1965) ("There is room for reasonable debate . . . where there has been both an 'arguable' unfair labor practice . . . and also a failure to comply with . . . Section 101(a)(5) . . . on the question of the preemptive jurisdiction of the Labor Board").

In essence, the LMRDA represented a congressional decision, prompted by the hearings of The Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee), that it was necessary to enact legislation which would supplement the NLRA and state law by protecting membership rights through the Secretary of Labor and the federal courts:

"In 1959 Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline." *Allis-Chalmers*, 388 U.S. at 175.

Titles II-VI of the LMRDA dealing with reporting, trusteeships, union elections, fiduciary standards for union officers and the enforcement mechanisms for these titles, comprise a subject matter (purely internal union affairs) completely separate from that dealt with in the NLRA. And Title VII which does regulate subjects intimately related to labor-management relations, the so-called "hot cargo" agreement, organizational picketing, pre-hire agreements in the construction industry, and the right of economic strikers to vote in representation elections, continued the pattern established in 1947 of entrusting such regulation to the NLRB. Thus, the main outlines of the 1959 legislation demonstrate that, as in 1947, Congress's actions were rooted in the conception that employment rights and membership rights were separate and distinct. And, of course, if that conception ruled in Title I, as well as Titles II through VII, the conclusion would be that the courts were not to take jurisdiction over alleged union interference with job rights.

Given the overall pattern just noted, one would expect that if Congress intended the courts to go beyond suits alleging interference with membership rights, there would be a plain and unequivocal manifestation of that desire. We have searched the legislative history with care; its most notable aspect is its silence as to the applicability of Title I

to union interference with job rights. There were no criticisms of the applicable NLRA law; no attempts to amend §§8(a)(3) and 8(b)(2); and no move to transfer the Board's jurisdiction over this class of unfair labor practices to the courts on the ground that this facet of the law was being maladministered. The arguments advanced in support of Title I were all but devoid of reference to job rights. And the few exceptions were in the nature of rhetorical flourishes which did not even acknowledge that §§8(a)(3) and 8(b)(2) were on the books, Leg. Hist. at 243, 308-309, 352-353.

Thus, the debate on Title I fails to establish a predicate for the conclusion that Congress desired to create an exception to the norm pursuant to which the NLRB exercises exclusive jurisdiction over charges whose substance is that §§8(a)(3) and 8(b)(2) have been violated. Indeed, the one aspect of the debate on Title I which throws a sustained light on this subject supports the inference that the premise shared by the legislators concerned with the development of Title I was that the subject matter of that Title was at the time open to the states, and that this state jurisdiction should be, and could be, preserved by a specific provision making it plain that the new jurisdiction granted the federal courts was not intended to preempt state law. Thus the first objection Senator Kennedy voiced to the McClellan "Bill of Rights" was that:

"members of unions are provided the rights specified in Title I more satisfactorily by present State law, by the provisions of the bill, and by the Taft-Hartley Act.

"I say that because I think the amendment raises the question of preemption. In other words, if the proposal were enacted, the present rather exhaustive remedies provided under the common law of the various States might be wiped out, and only the rights suggested by the Senator from Arkansas would then be available to union members." Leg. Hist. at 255.

Senators McClellan, Kuchel and Holland all responded by agreeing that this objection was soundly based, Leg. Hist.

at 255-265. And Senator McClellan therefore introduced an amendment to preclude the possibility that the LMRDA would preempt other remedies, Leg. Hist. at 266. It was adopted and is now §603. Finally, the Kuchel substitute supplemented §603 with the present §103 which preserves other federal and state rights and remedies, Leg. Hist. at 289, 300.

At the same time the Congress responded to the problem of the "no man's" land recognized in *Guss v. Utah L.R.B.*, 353 U.S. 1 (1957) by preserving exclusive Board jurisdiction as to all unfair labor practices, with the exception of a limited class which in the words of Senator Goldwater, the author of §14(c), have only "a slight impact on commerce." This contrast is comprehensible only on the hypothesis that Congress recognized that the areas regulated by the NLRA and the LMRDA were separate and distinct. For it would make no sense at all to preserve the power of the states to deal with LMRDA offenses, while preempting their authority to deal with unfair labor practices if the two Acts overlapped. On the other hand, if Congress had been acting on the view that there was a dichotomy between membership rights and employment rights, the differing approaches to preemption in the NLRA and LMRDA make perfect sense: centralized administrative expertise in the field of job rights was to continue; and the decentralized approach to settling questions concerning membership rights through the courts was also to remain the norm.

The inference that Congress intended to limit Title I to the protection of membership rights is strengthened by the fact that extending that Title to alleged interference with job rights would introduce a basic anomaly in the law that should not be lightly imputed to the legislature. It is a basic postulate of federal labor policy that the right to "abstain from joining any union without imperiling [one's] livelihood" is of the same dignity as the right to be a "good, bad or indifferent member," *Radio Officers*, 347 U.S. at 40. There is certainly nothing in the LMRDA's legislative history to indicate that the prime movers behind Title I,

Senators McClellan and Kuchel and Representatives Landrum and Griffin felt otherwise, and were of the view that a union member deserved greater legal protection against job discrimination than a non-member. But Title I can only be invoked by union members. This is readily understandable as long as Title I is restricted to membership rights, for by definition a non-member has no such rights to protect. On the other hand, this limitation is all but incomprehensible if Title I is interpreted to provide a remedy for loss of job rights. For the LMRDA would then open the court house doors for the "bad" member alleging an illegal refusal to refer him to a job despite the fact that those doors would be firmly closed to a non-member with the same complaint.

3. The foregoing establishes that Title I is limited to the protection of membership rights. It follows from the principles enunciated in *Garmon* and in *Calhoon v. Harvey*, 379 U.S. 34 (1964), that the courts do not have the authority to remedy alleged union interference with job rights. The Fifth Circuit in *Braswell*, however, took the position that "the purpose" of the NLRB's exclusive primary jurisdiction "is to prevent conflicts between federal and state policy" (A. 72). That assuredly is a purpose of the *Garmon* rule but it is not *the* purpose.

In *Garner v. Local 776 Teamsters*, 346 U.S. 485, 490 (1953), the Court stated:

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local . . . attitudes

toward labor controversies. . . . A multiplicity of tribunals . . . are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

The foregoing *rationale*, as *Garner* specifically points out, "prohibits federal courts from intervening in [NLRA] cases, except by review or on application of the federal Board . . . cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41," *id.* at 490. For, as the Court added in *Garmon*, while discussing the implications of *Garner*:

"[t]he unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.

• • •

"Administration is more than a means of regulation; administration is regulation." 359 U.S. at 242, 243.

The instant case demonstrates the accuracy of the *Garmon* opinion's insight. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198-199 (1941), establishes that "only actual losses [incurred by a discriminatee] should be made good" and that "losses which he willfully incurred" should be deducted from the amount he receives to make him "whole for losses suffered on account of an unfair labor practice." Thus it is part of the national labor policy to insure that the remedy for illegal discrimination does not encourage unreasonable refusals to work, and that the discriminatee, no less than the discriminator, does not profit from the unfair labor practice.

In the instant case mortality tables were introduced at the trial and Hardeman testified that he earned \$5500-\$6000 per year prior to his expulsion from the Union (Tr. 127, 202). On this basis, counsel for Hardeman argued to the jury that Hardeman's consequential damages were at least \$130,231.52, which represented his past and future loss of

wages from the date of his expulsion in 1960 until his projected retirement in 1983 at age 65 (Tr. 413-417). The District Court then charged the jury that it could find both compensatory and punitive damages (Tr. 446-447), and the jury returned a verdict for Hardeman in the amount of \$152,150 (A. 64-65).

This award of damages for future loss of employment is inconsistent with *Phelps Dodge* for it will either encourage an unreasonable refusal to seek employment by one who might otherwise contribute skilled services to society, or in the alternative will afford a windfall which the NLRA denies persons who have lost job rights due to discrimination based on union membership or non-membership. The Brief in Opposition to Certiorari, p. 17, justified the award of damages for loss of future employment in the following terms:

“[Hardeman] is in the same predicament as a disabled man. When a man is disabled in an automobile accident and because of his disability he is unable to follow his chosen profession and earn a livelihood, the tortfeasor is liable to the injured party for all future wages that he will lose.”

We think that this is an accurate assessment of the basis on which the jury and the courts below arrived at the determination that Hardeman had been injured and calculated the damages he was to be awarded. But the nature of the remedy for loss of employment due to incapacitation from an automobile accident is entirely distinct from the issue here; for in the instant case there is no bar to Hardeman's returning to work.

It is entirely understandable that a court, and under the court's direction a jury, would fall into this error, for personal injury litigation is a staple of judicial business. But it is unlikely that the NLRB would make such a mistake. This is not because the Board has greater wisdom than the courts, but because vindication of job rights which have been lost for union-connected reasons is the staple of the Board's business. And even as the courts in thousands of

cases award damages based on actuarial principles for loss of employment due to personal injuries, so does the Board in thousands of discrimination cases award reinstatement and back pay (subject to an obligation to mitigate damages). It is precisely to preserve the exclusive right of the Board to pass on allegations of, and to remedy, discriminatory loss of job rights that the courts must be held to lack jurisdiction to award damages for such losses.

4. During the past several years this Court has had occasion to pass on the interrelation of the Board's jurisdiction and that of the federal courts under both §301, *Smith v. Evening News*, 371 U.S. 195 (1962), and the judicially created doctrine of fair representation, *Vaca v. Sipes*, 386 U.S. 171 (1967); see also, *Meatcutters v. Jewel Tea*, 381 U.S. 676, 684-688 (1965), involving the antitrust laws. Those decisions, which were in favor of court jurisdiction:

"demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Vaca*, 386 U.S. at 180.

The basic "effect on the administration of the national labor policy" of a holding in favor of Board jurisdiction in both *Smith* and *Vaca* would have been to destroy an undoubted jurisdiction of the courts. For there can be no doubt that Congress deliberately chose to utilize the courts, rather than the NLRB, as the tribunal to hear suits on collective agreements, see, e.g., *Dowd Box v. Courtney*, 368 U.S. 502, 513 (1962). And as Professor Sovern concluded after an exhaustive review of the §301 preemption problem:

"In sum, *Garmon* cannot be applied to contract actions without depriving parties of a forum for the expeditious settlement of their contract claims. If for some definable class of cases involving collective agreements it could be said . . . that the Board can give all that the courts can give, application of *Garmon* would be appropriate. But no such class is apparent." Sovern,

Section 301 And The Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529, 572 (1963).

In other words, given the practical realities of the inter-relationship between §§7 and 8 and 301, Congress's desires would have been frustrated by the application of *Garmon*.

While *Vaca* is closely related to, and rests in part on *Smith*, see, 386 U.S. at 183-186, it also reflects an additional facet of the exclusive primary jurisdiction problem. As just noted, the prime consideration in the decision not to apply *Garmon* in §301 suits was that to do so would hobble the courts in administering a responsibility placed upon them by Congress. A decision to follow *Garmon* in *Vaca* would have had an even more far-reaching effect. Since the Board's "tardy" entrance into the field consisted of accepting the substantive law "as it had been developed by the federal courts" application of *Garmon* would have completely displaced the judiciary's "traditional supervisory jurisdiction" to assure fair representation; a jurisdiction assumed in order to forestall "grave constitutional problems," and as to which "it can be doubted whether the Board brings substantially greater expertise to bear . . . than do the courts" 386 U.S. at 181-183. Indeed, in light of the above it could even be said that the real question in *Vaca* was whether the courts had primary exclusive jurisdiction.

The instant case stands in sharp contrast to *Smith* and *Vaca*. Here there is no difficulty in allocating to the NLRB that which is the Board's, and to the federal courts that which is the courts', without infringing on the ability of either to function effectively. The "nature of the activity . . . sought to be regulated" *Garmon*, 359 U.S. at 243, provides a reliable guide to decision. For as just developed, pp. 20-25 *supra*, the jurisdiction of the Board relates to the regulation and protection of employment rights, while the jurisdiction of the courts under the LMRDA relates to the regulation and protection of membership rights. There will, of course, be cases in which the complainant alleges that as the result of a single dispute the union has moved against

both his job rights and membership rights. But as the evidence in the instant case indicates, these two claims never fuse into one. The distinction between the act of expelling, suspending or firing a union member as a member, and the separate act of seeking his discharge, or refusing to refer him to work, will always be manifest. Both may stem from a common base, the underlying dispute, but it is their nature to branch out in separate directions. Thus, the proof required to show an illegal expulsion and an illegal refusal to refer will always tend to be separate and distinct rather than overlapping. Moreover, a line of demarcation between Board and court jurisdiction based on the employment rights-membership rights dichotomy may require that two separate suits be pursued. But this is by no means inconsistent with the congressional understanding of the scope of Title I of the LMRDA. For in a wholly analogous situation this Court has squarely held that it is improper to expand the scope of Title I if the result would be to frustrate Congress's determination that two separate procedures—one administrative and one judicial—must be followed in order to secure the complainant the relief he desires:

“We hold that possible violations of Title IV of the Act regarding eligibility are not relevant in determining whether or not a district court has jurisdiction under §102 of Title I of the Act. Title IV sets up a statutory scheme governing the election of union officers . . . Section 402 of Title IV, . . . sets up an exclusive method for protecting Title IV rights, by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV. Upon complaint the Secretary investigates and if he finds probable cause to believe that Title IV has been violated, he may file suit in the appropriate district court. It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest. Cf. *San Diego Building Trades Council v. Garmon*, 359 US 236. In so doing Congress, with one exception not here relevant, decided not to permit individuals to block or delay union elec-

tions by filing federal-court suits for violations of Title IV. . . . [We] are satisfied that the Act itself shows clearly by its structure and language that the disputes here, basically relating as they do to eligibility of candidates for office, fall squarely within Title IV of the Act and are to be resolved by the administrative and judicial procedures set out in that Title." *Calhoon v. Harvey*, 379 U.S. at 139-141.

By the same token Congress has chosen to utilize the "special knowledge and discretion" of the NLRB, "the agency of government most familiar with" the subject (*id.* at 140) as the exclusive method of protecting employment rights. Thus the parallel to the instant case is plain. For in *Calhoon v. Harvey* the complainant attempted to expand the scope of Title I to permit the trial of Title IV issues in a suit brought by an individual member pursuant to §102. The argument presented was that this expansion was necessary to insure that complete relief could be granted in a single law suit. This Court rejected this attempted expansion of Title I on the ground that the LMRDA's "structure and language" demonstrated that the Secretary of Labor's authority to enforce Title IV was "exclusive." Here Hardeman sought, and was allowed to expand Title I to permit the trial of unfair labor practice issues in a suit brought under §102. And again the argument is that the jurisdiction granted by Title I should be expanded in order to empower the courts to grant full relief. This argument is as unsound in this context as it was in *Calhoon v. Harvey*. For the structure and language of both the NLRA and LMRDA demonstrate that Congress intended the administrative procedures of the NLRB to be the exclusive means of protecting the right not to be discriminated against in employment because of union activity.

5. *Machinists v. Gonzales*, 356 U.S. 617, 618-621 (1958), held that a state court exercising its acknowledged jurisdiction over a membership dispute could, in order to "fill out" the remedy, award damages based on alleged union interference with job rights despite the fact that this "remedial action" invades the exclusive primary jurisdiction of the

NLRB. In *Borden*, however, the Court carefully reserved the question of "the extent to which the holding in *Garmon* 359 U.S. 236, *supra*, qualified the principles declared in *Gonzales* with respect to jurisdiction to avoid consequential damages," 379 U.S. at 697.

The AFL-CIO, in its *amicus* brief in *Transit Employees v. Lockridge*, No. 76 this term, pp. 10-20, has set out its reasons for believing that the *rationale* of *Garmon* completely undermines the proposition that a court with the authority to adjudicate membership rights may also adjudicate employment rights under the guise of awarding consequential damages, and we respectfully direct the Court's attention to that brief for a complete statement of our views. We simply note here that in essence the argument developed at length in *Lockridge* is that the above noted portion of *Gonzales* is inconsistent with the line of post-*Garmon* authority recognizing that clear and definite lines, based on the "nature of the activities" in question (359 U.S. at 243), are required in delimiting the area open to the NLRB on the one hand and to the courts on the other, in order to insure that the narrow exceptions to the exclusive primary jurisdiction rule do not serve to undermine the basic doctrine, see *Mine Workers v. Gibbs*, 383 U.S. 715, 729-730 (1966); *Local 1625 Retail Clerks v. Schermerhorn*, 375 U.S. 96, 105 (1963); *Hanna Mining Co. v. District 2 MEBA*, 382 U.S. 181, 192-193 (1965); *Local 1416 ILA v. Ariadne Shipping Co.*, 397 U.S. 195, 200-201 (1970); *Linn v. Plant Guards*, 383 U.S. 53, 64-65 (1966). Thus the theory of *Gonzales* is unsound because its focus on the legal labels utilized to characterize the claim presented, rather than on the nature of the underlying activity in question, permits the plaintiff by artful pleading to shift the line of demarcation in the direction of greater or lesser court jurisdiction depending on the nature of his interests. This is completely inconsistent with the recognition that "Congress has entrusted administration of the labor policy for the Nation to [the NLRB]" and that "administration is more than a means of regulation; administration is regulation" *Garmon*, 359 U.S. at 242, 243.

These considerations are fully applicable here. It is just as destructive to the sound administration of the national labor policy to have a shifting and uncertain line setting the bounds between the jurisdiction of the NLRB and the federal courts as it is to have such a line between the Board and the state courts. In both instances the proper approach is one which starts from the recognition that it is Congress's intent that the courts are simply to regulate and protect membership rights, and that the regulation and protection of employment rights is to be a matter within the exclusive primary jurisdiction of the Board.

CONCLUSION

For the reasons set out above, as well as those stated by the Petitioner, the decision below should be reversed.

Respectfully submitted,

J. ALBERT WOLL

General Counsel, AFL-CIO

ROBERT C. MAYER

LAURENCE GOLD

736 Bowen Building

815 Fifteenth Street, N.W.

Washington, D. C. 20005

THOMAS E. HARRIS

Associate General Counsel, AFL-CIO

815 Sixteenth Street, N.W.

Washington, D. C. 20006

August, 1970

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

INTERNATIONAL BROTHERHOOD OF BOILER- MAKERS, IRON SHIPBUILDERS, BLACK- SMITHS, FORGERS AND HELPERS, AFL-CIO *v.* HARDEMAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 123. Argued December 16, 1970—Decided February 24, 1971

Respondent, who was a member of petitioner union, assaulted the business manager of his local for allegedly failing to refer him for a job, and was tried for this conduct by the union on charges of (1) creating dissension, and working against the interest and harmony of the local, which carried a penalty of expulsion, and (2) of threatening and using force to restrain an officer from discharging the duties of his union office, punishable "as warranted by the offense." He was found "guilty as charged" and expelled for an indefinite period. He later brought suit for damages alleging that petitioner violated § 101 (a) (5) of the Labor-Management Reporting and Disclosure Act by denying him a full and fair hearing in the disciplinary proceedings. The District Judge found that there was no transcript evidence to support the charge of creating dissension, and since the union tribunal had returned only a general verdict, held that respondent was deprived of the statutory "full and fair hearing." The Court of Appeals affirmed. Certiorari was granted to consider whether the subject matter was pre-empted because exclusively within the competence of the National Labor Relations Board, or, if not, whether the courts below had applied the proper standard of review. *Held:*

1. This action was within the competence of the District Court, as the issues here are whether respondent was denied rights guaranteed him by § 101 (a) (5), and, if so, his consequent entitlement, pursuant to the federal statute, to damages for that denial, questions that are irrelevant to the legality of conduct under the National Labor Relations Act. Pp. 4-8.

Syllabus

2. Section 101 (a)(5) does not empower courts to determine what conduct may warrant disciplinary action by a union against its members. Pp. 9-12.

3. The statutory "full and fair hearing" requires that the charging party provide some evidence at the hearing to support the charges, and here there was sufficient evidence to support the finding that respondent attacked the business manager as charged. Pp. 12-14.

420 F. 2d 485, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., filed a concurring opinion. DOUGLAS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 123.—OCTOBER TERM, 1970

International Brotherhood of
Boilermakers, Iron Ship-
builders, Blacksmiths, For-
gers and Helpers, AFL-CIO,
Petitioner,
v.

George W. Hardeman.

On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

[February 24, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 102 of the Labor-Management Reporting and Disclosure Act (hereafter LMRDA) provides that a union member who charges that his union violated his rights under Title I of the Act may bring a civil action against the union in a district court of the United States for appropriate relief.¹ Respondent was expelled from membership in petitioner union and brought this action under § 102 in the District Court for the Southern District of Alabama. He alleged that in expelling him the petitioner violated § 101 (a) (5) of the Act, 73 Stat. 519, 29 U. S. C. § 411 (a) (5) which provides: "No member of

¹ Section 102 of the Act, 73 Stat. 519, 29 U. S. C. § 412, provides:

"Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in the district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." A jury awarded respondent damages of \$152,150. The Court of Appeals for the Fifth Circuit affirmed. 420 F. 2d 485 (1969).² We granted certiorari limited to the questions whether the subject matter of the suit was preempted because exclusively within the competence of the National Labor Relations Board and, if not preempted, whether the courts below had applied the proper standard of review to the union proceedings, 398 U. S. 926 (1970). We reverse.

The case arises out of events in the early part of October 1960. Respondent, George Hardeman, is a boilermaker. He was then a member of petitioner's Local Lodge 112. On October 3, he went to the union hiring hall to see Herman Wise, business manager of the Local Lodge and the official responsible for referring workmen for jobs. Hardeman had talked to a friend of his, an employer who had promised to ask for him by name for a job in the vicinity. He sought assurance from Wise that he would be referred for the job. When Wise refused to make a definite commitment, Hardeman threatened violence if no work was forthcoming in the next few days.

On October 4, Hardeman returned to the hiring hall and waited for a referral. None was forthcoming. The next day, in his words, he "went to the hall . . . and waited from the time the hall opened until we had the trouble. I tried to make up my mind what to do, whether to sue the local or Wise or beat hell out of Wise, and

² The affirmance was on the basis of *Boilermakers v. Braswell*, 388 F. 2d 193 (CA5 1968).

then I made up my mind." When Wise came out of his office to go to a local jobsite, as required by his duties as business manager, Hardeman handed him a copy of a telegram asking for Hardeman by name. As Wise was reading the telegram, Hardeman began punching him in the face.

Hardeman was tried for this conduct on charges of creating dissension and working against the interest and harmony of the Local Lodge,³ and of threatening and using force to restrain an officer of the Local Lodge from properly discharging the duties of his office.⁴ The trial committee found him "guilty as charged," and the Local Lodge sustained the finding and voted his expulsion for an indefinite period. Internal union review of this action, instituted by Hardeman, modified neither the verdict nor the penalty. Five years later, Hardeman brought

³ Article 13, § 1, of the Subordinate Lodge Constitution then in force provided:

"Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Brotherhood or of any District or Subordinate Lodge; who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its Subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood."

⁴ Article 12, § 1, of the Subordinate Lodge By-Laws then in force provided that "It shall be a violation of these By-Laws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office." Violators of Article 12 are to "be punished as warranted by the offense."

this suit alleging that petitioner violated § 101 (a)(5) by denying him a full and fair hearing in the union disciplinary proceedings.

I

We consider first the union's claim that the subject matter of this lawsuit is, in the first instance, within the exclusive competence of the National Labor Relations Board. The union argues that the gravamen of Harde-
man's complaint—which did not seek reinstatement, but only damages for wrongful expulsion, consisting of loss of income, loss of pension and insurance rights, mental anguish and punitive damages—is discrimination against him in job referrals; that any such conduct on the part of the union is at the very least arguably an unfair labor practice under §§ 8 (b)(1)(A) and 8 (b)(2) of the National Labor Relations Act, 29 U. S. C. §§ 158 (b)(1)(A), 158 (b)(2); and that in such circumstances, “the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of . . . interference with national policy is to be averted.” *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 245 (1959); see *Local 100, Journeymen v. Borden*, 373 U. S. 690 (1963).

We think the union's argument is misdirected. Harde-
man's complaint alleged that his expulsion was unlawful under § 101 (a)(5), and sought compensation for the consequences of the claimed wrongful expulsion. The critical issue presented by Harde-
man's complaint was whether the union disciplinary proceedings had denied him a full and fair hearing within the meaning of § 101 (a)(5)(C).⁵ Unless he could establish this claim, Harde-
man would be out of court. We hold that this claim was

⁵ Harde-
man's complaint did not claim that the charges were insufficiently specific, or that he did not have adequate time to prepare his defense in the union proceedings.

not within the exclusive competence of the National Labor Relations Board.

"The doctrine of primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.' *United States v. Western Pac. R. Co.*, 352 U. S. 59, 63-64. The doctrine is based on the principle 'that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over,' *Far East Conference v. United States*, 342 U. S. 570, 574, and 'requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme,' *United States v. Philadelphia Nat. Bank*, 374 U. S. 321, 353." *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U. S. 676, 684-685 (1965) (opinion of WHITE, J., announcing judgment).

Those factors suggesting that resort must be had to the administrative process are absent from the present case. The fairness of an internal union disciplinary proceeding is hardly a question beyond "the conventional experience of judges," nor can it be said to raise issues "within the special competence" of the NLRB. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 181, 193-194 (1967). As we noted in that case, the Eighty-Sixth Congress which enacted § 101 (a)(5) was "plainly

of the view" that the protections embodied therein were new material in the body of federal labor law. 388 U. S., at 194. And that same Congress explicitly referred claims under § 101 (a)(5) not to the NLRB, but to the federal district courts. This is made explicit in the opening sentence of § 102: "Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." Of course, "[t]he purpose of Congress is the ultimate touchstone." *Retail Clerks Local 1625 v. Schermerhorn*, 375 U. S. 96, 103 (1963). And in § 102 Congress has clearly indicated a purpose to refer claims regarding violation of § 101 (a)(5) to the district courts.

The union argues that Hardeman's suit should nevertheless have been dismissed because he did not seek an injunction restoring him to membership, and because he did seek damages for loss of employment said to be the consequence of his expulsion from the union. Taken together, these factors are said to shift the primary focus of the action from a review of Hardeman's expulsion to a review of alleged union discrimination against him in job referrals. Since this is a matter normally within the exclusive competence of the NLRB, see *Local 100, Journeymen v. Borden*, 373 U. S., at 695-696, the union argues that Hardeman's suit was beyond the competence of the district court.

The argument has no merit. To begin with, the language of § 102 does not appear to make the availability of damages turn upon whether an injunction is requested as well. If anything, § 102 contemplates that damages will be the usual, and injunctions the extraordinary form of relief. Requiring that injunctive relief be sought as a precondition to damages would have little effect other than to force plaintiffs, as a matter of course, to add a

few words to their complaints seeking an undesired injunction. We see no reason to import into § 102 so trivial a requirement.

Nor are our prior cases authority for such a result. We have repeatedly held, of course, that state law may not regulate conduct either protected or prohibited by the National Labor Relations Act. *Local 100, Journeymen v. Borden*, *supra*; *San Diego Building Trades Council v. Garmon*, 359 U. S., at 244; *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 480-481 (1955); *Garner v. Teamsters Union*, 346 U. S. 485, 490-491 (1953). Where it has not been clear whether particular conduct is protected, prohibited, or left to state regulation by that Act, we have likewise required courts to stay their hand, for "courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Building Trades Council v. Garmon*, *supra*, at 244-245. Nor may courts intervene in such matters even to apply the National Labor Relations Act, except by the normal mechanism of review of actions of the NLRB. For recognizing that "[a] multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law," *Garner v. Teamsters Union*, *supra*, Congress confided to the NLRB the primary power of interpretation and application of the Act. See *Guss v. Utah Labor Relations Board*, 353 U. S. 1 (1957).

The present case, however, implicates none of the principles discussed above. There is no attempt, in this lawsuit, to apply state law to matters preempted by federal authority. Nor is there an attempt to apply federal law of general application, which is limited in the particular circumstances by the National Labor Relations Act. Nor is there an attempt to have the district court

enforce the provisions of the National Labor Relations Act itself, without guidance from the NLRB. As we have said, the critical question in this action is whether Hardeman was afforded the rights guaranteed him by § 101 (a)(5) of the LMRDA. If he was denied them, Congress has said that he is entitled to damages for the consequences of that denial. Since these questions are irrelevant to the legality of conduct under the National Labor Relations Act, there is no danger of conflicting interpretation of its provisions. And since the law applied is federal law explicitly made applicable to such circumstances by Congress, there is no danger that state law may come in through the back door to regulate conduct that has been removed by Congress from state control. Accordingly, this action was within the competence of the district court.⁶

II

Two charges were brought against Hardeman in the union disciplinary proceedings. He was charged with violation of Article 13, § 1, of the Subordinate Lodge Constitution, which forbids attempting to create dissension or working against the interest and harmony of the union, and carries a penalty of expulsion.⁷ He was also charged with violation of Article 12, § 1, of the Subordinate Lodge By-Laws, which forbids the threat or use of force against any officer of the union in order to prevent him from properly discharging the duties of his office; violation may be punished "as warranted by

⁶ See *Boilermakers v. Braswell*, 388 F. 2d 193, 195-197 (CA5 1968). Accord, *Rekant v. Shochtay-Gasos Local 446*, 320 F. 2d 271, 273-275 (CA3 1963); *Parks v. Electrical Workers*, 314 F. 2d 886, 922-923 (CA4 1963); *Addison v. Machinists*, 300 F. 2d 863 (CA9 1962); *Machinists v. King*, 335 F. 2d 340, 346-347 (CA9 1964).

⁷ See n. 3, *supra*.

the offense.”⁸ Hardeman’s conviction on both charges was upheld in internal union procedures for review.

The trial judge instructed the jury that “whether or not he [respondent] was rightfully or wrongfully discharged or expelled is a pure question of law for me to determine.” He assumed, but did not decide, that the transcript of the union disciplinary hearing contained evidence adequate to support conviction of violating Article 12. He held, however, that there was no evidence at all in the transcript of the union disciplinary proceedings to support the charge of violating Article 13. This holding appears to have been based on the Fifth Circuit’s decision in *Boilermakers v. Braswell*, 388 F. 2d 193 (CA5 1968). There the Court of Appeals for the Fifth Circuit had reasoned that “penal provisions in union constitutions must be strictly construed.”⁹ and that as so construed Article 13 was directed only to “threats to the union as an organization and to the effective carrying out of the union’s aims,” not to merely personal altercations. 388 F. 2d., at 199. Since the union tribunals had returned only a general verdict, and since one of the charges was thought to be supported by no evidence whatsoever, the trial judge held that Hardeman had been deprived of the full and fair hearing guaranteed by § 101 (a)(5).¹⁰ The Court of Appeals affirmed, simply citing *Braswell*. 420 F. 2d 485 (CA5 1970).

We find nothing in either the language or the legislative history of § 101 (a)(5) that could justify such a substitution of judicial for union authority to interpret the union’s regulations in order to determine the scope of

⁸ See n. 4, *supra*.

⁹ 388 F. 2d, at 198, quoting *Allen v. Theatrical Employees*, 338 F. 2d 309, 316 (CA5 1964).

¹⁰ This reasoning was noted but not specifically endorsed in *Braswell*, 388 F. 2d, at 198.

offenses warranting discipline of union members. Section 101 (a)(5) began life as a floor amendment to S. 1555, the Kennedy-Ervin Bill, in the Eighty-Sixth Congress. As proposed by Senator McClellan, and as adopted by the Senate on April 22, 1959, the amendment would have forbidden discipline of union members "except for breach of a published written rule of [the union]." 105 Cong. Rec. 6476, 6492-6493 (1959). But this language did not long survive. Two days later, a substitute amendment was offered by Senator Kuchel, who explained that further study of the McClellan amendment had raised "some rather vexing questions." *Id.*, at 6720. The Kuchel substitute, adopted the following day, deleted the requirement that charges be based upon a previously published, written union rule; it transformed Senator McClellan's amendment, in relevant part, into the present language of § 101 (a)(5). *Id.*, at 6720, 6727. As so amended, S. 1555 passed the Senate on April 25. *Id.*, at 6745. Identical language was adopted by the House, *id.*, at 15884, 15891, and appears in the statute as finally enacted.

The Congress understood that Senator Kuchel's amendment was intended to make substantive changes in Senator McClellan's proposal. Senator Kennedy had specifically objected to the McClellan amendment because

"In the case of . . . the . . . official who bribed a judge, unless there were a specific prohibition against bribery of judicial officers written into the constitution of the union, then no union could take disciplinary action against [an] officer or member guilty of bribery.

"It seems to me that we can trust union officers to run their affairs better than that." *Id.*, at 6491.

Senator Kuchel described his substitute as merely providing "the usual reasonable constitutional basis" for union disciplinary proceedings: union members were to have "constitutionally reasonable notice and a reasonable hearing." *Id.*, at 6720. After the Kuchel amendment passed the Senate, Senator Goldwater explained it to the House Committee on Labor and Education as follows:

"[T]he bill of rights in the Senate bill require[s] that the union member be served with written charges prior to any disciplinary proceedings but it does not require that these charges, to be valid, must be based on activity that the union had proscribed prior to the union member having engaged in such activity." Labor-Management Reform Legislation, Hearings before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess. pt. 4, p. 1595 (1959).

And Senator McClellan's testimony was to the same effect. *Id.*, pt. 5, 2235-2236, 2251, 2285.

We think that this is sufficient to indicate that § 101 (a)(5) was not intended to authorize courts to determine the scope of offenses for which a union may discipline its members.¹¹ And if a union may discipline its members for offenses not proscribed by written rules at all, it is surely a futile exercise for a court to construe the written rules in order to determine whether particular conduct falls within or without their scope.

¹¹ State law, in many circumstances, may go further. See Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 Yale L. J. 175 (1960). But Congress, which preserved state law remedies by § 103 of the LMRDA, 29 U. S. C. § 413, was well aware that even the broad language of Senator McClellan's original proposal was more limited in scope than much state law. See 105 Cong. Rec. 6481-6489 (1959).

Of course, § 101 (a)(5)(A) requires that a member subject to discipline be "served with written specific charges." These charges must be, in Senator McClellan's words, "specific enough to inform the accused member of the offense that he has allegedly committed."¹² Where, as here, the union's charges make reference to specific written provisions, § 101 (a)(5)(A) obviously empowers the federal courts to examine those provisions and determine whether the union member had been misled or otherwise prejudiced in the presentation of his defense. But it gives courts no warrant to scrutinize the union regulations in order to determine whether particular conduct may be punished at all.

Respondent does not suggest, and we cannot discern, any possibility of prejudice in the present case. Although the notice of charges with which he was served does not appear as such in the record, the transcript of the union hearing indicates that the notice did not confine itself to a mere statement or citation of the written regulations that Hardeman was said to have violated: the notice appears to have contained a detailed statement of the facts relating to the fight which formed the basis for the disciplinary action.¹³ Section 101 (a)(5) requires no more.

III

There remains only the question whether the evidence in the union disciplinary proceeding was sufficient to support the finding of guilt. Section 101 (a)(5)(C) of the LMRDA guarantees union members a "full and fair" disciplinary hearing, and the parties and the lower federal courts are in full agreement that this guarantee requires

¹² Labor-Management Reform Legislation, Hearings before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess., pt. 5, p. 2285 (1959).

¹³ See transcript of union disciplinary hearing, at 26-28, 76.

the charging party to provide some evidence at the disciplinary hearing to support the charges made.¹⁴ This is the proper standard of judicial review. We have repeatedly held that conviction on charges unsupported by any evidence is a denial of due process, *Thompson v. Louisville*, 362 U. S. 199, 206 (1960); *Schware v. Board of Bar Examiners*, 353 U. S. 232, 246-247 (1957); *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 106 (1927); *Tisi v. Tod*, 264 U. S. 131, 133-134 (1924); and we feel that § 101 (a)(5)(C) may fairly be said to import a similar requirement into union disciplinary proceedings. Senator Kuchel, who first introduced the provision, characterized it on the Senate floor as requiring the "usual reasonable constitutional basis" for disciplinary action, 105 Cong. Rec. 6720 (1959), and any lesser standard would make useless § 101 (a)(5)(A)'s requirement of written, specific charges. A stricter standard, on the other hand, would be inconsistent with the apparent congressional intent to allow unions to govern their own affairs, and would require courts to judge the credibility of witnesses on the basis of what would be at best a cold record.¹⁵

Applying this standard to the present case, we think there is no question that the charges were adequately supported. Respondent was charged with having attacked Wise without warning, and with continuing to beat him for some time. Wise so testified at the disciplinary hear-

¹⁴ *Vars v. Boilermakers*, 320 F. 2d 576 (CA2 1963); *Rosen v. Painters*, 198 F. Supp. 46 (SDNY 1961), appeal dismissed, 326 F. 2d 400 (CA2 1964); *Lewis v. American Federation of State Employees*, 407 F. 2d 1185 (CA3 1969); *Boilermakers v. Braswell*, 388 F. 2d 193 (CA5 1968); *Burke v. Boilermakers*, 417 F. 2d 1063 (CA9 1969), affirming 302 F. Supp. 1345 (ND Cal. 1967).

¹⁵ Although a transcript was made of the union proceedings in the present case, we have no reason to believe that this is a universal practice.

ing, and his testimony was fully corroborated by one other witness to the altercation. Even Hardeman, although he claimed he was thereafter held and beaten, admitted having struck the first blow. On such a record there is no question but that the charges were supported by "some evidence."

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 123.—OCTOBER TERM, 1970

International Brotherhood of
Boilermakers, Iron Ship-
builders, Blacksmith, For-
gers and Helpers, AFL-CIO,
Petitioner,

v.

George W. Hardeman.

On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

[February 24, 1971]

MR. JUSTICE WHITE, concurring.

The Court accurately states the holdings in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), and like cases. But since the case before us “implicates none of the principles,” *ante*, p. —, announced in those cases, neither is their continuing validity in their full sweep reaffirmed by today’s opinion. On this basis, I join the Court’s opinion.

I add an additional note. As the Court says, Hardeman’s conviction on both charges against him was upheld. Expulsion was warranted on either count. The principle of *Stromberg v. California*, 283 U. S. 359 (1931), has no application in this situation. *Turner v. United States*, 396 U. S. 398, 420 (1970); *Barenblatt v. United States*, 360 U. S. 109, 115 (1959); *Claassen v. United States*, 142 U. S. 140, 146–147 (1891); see also, cases cited in *Street v. New York*, 394 U. S. 576, 613 n. 2 (1969) (dissenting opinion of WHITE, J.).

SUPREME COURT OF THE UNITED STATES

No. 123.—OCTOBER TERM, 1970

International Brotherhood of
Boilermakers, Iron Ship-
builders, Blacksmiths, For-
gers and Helpers, AFL-CIO,
Petitioner,

v.

George W. Hardeman.

On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

[February 24, 1971]

MR. JUSTICE DOUGLAS, dissenting.

Section 102 of the Landrum-Griffin Act, 73 Stat. 523, 29 U. S. C. § 412, gives a member of a union the right of civil redress in a federal district court against his union for infringement of his rights secured by the Act¹ at the same time § 103, 29 U. S. C. § 413, reserves to members any remedies they may have "under any State or Federal law or before any court or other tribunal, or under the constitution and by-laws" of their unions. Moreover, § 101 (a)(5), 29 U. S. C. § 411 (a)(5),² pro-

¹Section 102 provides:

"Any person whose rights secured by the provision of this sub-chapter have been infringed by any violation of this sub-chapter may bring a *civil action in a District Court of the United States*, for such relief (including injunctions) as may be appropriate. Any such action against a labor organization *shall be brought in the District Court of the United States* for the district where the alleged violation occurred, or where the principal office of such labor organization is located." (Emphasis added.)

²Section 101 (a)(5) provides:

"... No member of any labor organization may be fined, suspended, expelled or otherwise disciplined except for nonpayment of dues, by such organization or by any officer thereof, unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

vides that, except for nonpayment of dues, no member of a labor organization may be expelled or disciplined until there has been notice and a fair hearing.

The latter right is not exclusive for as noted the Act gives members remedies for infringement of rights under the Act or under the constitution and bylaws of the union.

In the present case respondent went to one Wise, in charge of referral of men to jobs through the union hiring hall, and during the discussion which followed there was an altercation in which respondent hit Wise. For that assault respondent was fined in a criminal court. Thereupon Wise filed charges against respondent for violations of one provision of the union's bylaws³ and one provision of the union's constitution.⁴

³ Article XII (1) of the bylaws provides:

"In addition to the offenses and penalties set out in the applicable provisions of the International and Subordinate Lodge Constitution, the following offenses and penalties shall be observed in this Subordinate Lodge, and any member who violates same shall, if found guilty after proper hearing as provided herein, be punished as warranted by the offense.

"(1) It shall be a violation of these By-Laws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office."

⁴ Article XIII, § 1, of the constitution provides:

"Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Brotherhood or of any District or Subordinate Lodge; who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its Subordinate Lodges, or which is antagonistic to the

At a hearing before a committee of the local lodge which Hardeman attended it was determined that respondent was "guilty as charged." That determination was approved by the membership of the local which voted to suspend him from membership "indefinitely."

Respondent appealed to the International Union, petitioner here. Acting through its president and its international executive council it denied the appeal.

Thereafter respondent sued International for consequential and punitive damages. The case was tried by a jury which returned a verdict of \$152,150 and the Court of Appeals affirmed. 420 F. 2d 485.

There was evidence that there was a grudge between Wise and respondent, out of which the fist fight occurred. And there was evidence that the force or violence was an attempt to coerce Wise "to prevent him from properly discharging the duties of his office" within a rational meaning of the bylaws of the union.⁵ And the District Court so charged the jury. But, as the District Court ruled, there was no evidence that respondent endeavored "to create dissension among the members" or to work against the "interests and harmony" of the union within the meaning of Article XIII of the Constitution.⁶

I agree that a court does not sit in review of a union as it does of an administrative agency. But by reason of § 101 (a)(5) judicial oversight is much more than procedural; it provides in subsection (C) for "a full and fair hearing." Even if every conceivable procedural guarantee is provided, a hearing is not "fair" when all substantive rights are stripped away to reach a pre-

principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood."

⁵ See n. 3, *supra*.

⁶ See n. 3, *supra*.

ordained result. If there is to be a "fair hearing" there must, I submit, be some evidence directed to the charges to support the conclusion.

Membership in a union may be the key to livelihood itself.⁷ Without membership, the member may be cast into the outer darkness, so far as employment is concerned. Just as this Court concluded Congress did not authorize exclusive bargaining agents to make invidious discriminations, *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192, it is unthinkable to me that Congress in designing § 101 (a) (5) gave unions the authority to expel members for such reasons as they chose. For courts to lend their hand to such oppressive practices is to put the judicial imprimatur behind the union's utter disregard of due process to reach its own ends.

In *International Brotherhood v. Braswell*, arising out of the same incident, the Court of Appeals followed that reasoning. 388 F. 2d 193, 198-199. It said:

"... the act charged to Braswell was a blow struck in anger, and nothing more. However reprehensible this act may be, it did not constitute a violation of the provisions in the charges. Article XIII, Section 1 of the constitution on its face is directed at threats to the union as an organization and to the effective carrying out of the union's aims. Braswell's fist was not such a threat."

As stated by a student in this area "... how can there be a 'full and fair hearing' when it results in a verdict which mocks the evidence?"⁸ Of course the reviewing court does not give a hearing *de novo*; nor does it review

⁷ Hardeman testified at trial that following the loss of his union card he was unable to work in the boilermaker's trade beyond one job lasting five days.

⁸ Christensen, *Union Discipline Under Federal Law*, 43 N. Y. U. L. Rev. 227, 251.

the merits of the dispute. But it does sit to check intemperate use of union power; and if it is to discharge its duties, it must conclude that there is some evidence to sustain the charge. This is the view of the Second, Third, and Fifth Circuits, *Vars v. International Brotherhood*, 320 F. 2d 576; *Kelsey v. Philadelphia Local No. 8*, 419 F. 2d 491; *International Brotherhood v. Braswell*, 388 F. 2d 193, and I would adopt it as the controlling legal principle.

Violation of the Article XIII of the constitution carries with it automatic expulsion. Violation of the bylaws would carry punishment "as warranted by the offense," which, I assume would justify expulsion. For respondent to use force against Wise who was in charge of referral of men to jobs through the union hiring hall may well have been an attempt "to prevent him from properly discharging the duties of his office" within the meaning of Article XII. But how an isolated fist fight could "create dissension" among union members or work against the union's interests in the other ways described in Article XIII remains a mystery.

The finding of the union was the general one "guilty as charged." Under which provision—constitution or by-law—it suspended him indefinitely is not made clear. Perhaps it was under only one or perhaps under both provisions.

In that posture the case is in the category of *Stromberg v. California*, 283 U. S. 359, where a conviction might have been valid under one charge but would have been invalid under the other; but the verdict being a general one, it was impossible to tell under which he was convicted. It is as much a denial of due process to sustain a conviction merely because a verdict of guilty might have been rendered on a valid ground as it is to send an accused to prison following conviction of a charge

on which he was never tried. *Cole v. Arkansas*, 333 U. S. 196, 201. It was in that tradition that the District Court charged the jury: ⁹

"Now, that is all they charged him with were those two sections and there is nothing in this record that would justify a finding of guilty under those sections. All of it is about the fight.

"I am telling you, as a matter of law, that under the proof, the finding which resulted in *his being expelled*, cannot legally stand and therefore he was wrongfully expelled." (*Italics added.*)

Since the finding of "guilty as charged" had that infirmity, it could not stand; and the jury was justified in assessing damages for an unlawful expulsion.¹⁰

⁹ The Court of Appeals affirmed summarily on the basis of *International Brotherhood v. Braswell*, 388 F. 2d 193, a case arising out of the same factual situation as Braswell who assaulted Wise at the time respondent assaulted him. In *Braswell*, the Court of Appeals found that the blow was "struck in anger, and nothing more." Hence it held that Braswell's fist was not used as an effort to create dissension among members within the meaning of Article XIII of the constitution. By its summary affirmance in the present case it presumably reached the same conclusion in the present case.

¹⁰ It is urged that since respondent's complaint arose out of his effort to obtain employment, his relief may be sought only from the National Labor Relations Board. See *San Diego Building Trades v. Garmon*, 359 U. S. 236; *Local 100 v. Borden*, 373 U. S. 690; *Local 207 v. Perko*, 373 U. S. 701. The argument is that the expulsion of respondent was "arguably" an unfair labor practice and that exclusive jurisdiction therefore was with the Board. But *Garmon* prevents conflicts between federal and state policy. If there is a conflict in the present case, it is between two federal agencies; and Congress has declared in § 102 of the Landrum-Griffin Act that the federal court, not the Board, are to have the primary role.